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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. ~~253~~ 24.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.
No. ~~260~~ 27.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for the Chesapeake & Ohio Railway Company.

J. P. BELL COMPANY, Printers, Lynchburg, Va.

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v.
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THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY. } No. 260.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for the Chesapeake & Ohio Railway Company.

STATEMENT.

This proceeding was begun in the United States Circuit Court for the Western District of Virginia by a petition in equity filed by the Interstate Commerce Commission on the 13th day of July, 1903, charging the Chesapeake & Ohio Railway Company with violating the Interstate Commerce Act by carrying coal in the months of May and June, 1903, for the New York, New Haven & Hartford Railroad Company "at less than its published rates on file and thereby committing a discrimination forbidden by law;" and charging the New York, New Haven & Hartford Railroad Company with receiving the alleged "rebate or concession upon the coal so carried for it knowingly," and "with acting equally in violation of law with the Chesapeake & Ohio Railway Company." The Court was asked by proper order against the Chesapeake & Ohio Railway Company and the New York,

New Haven & Hartford Railroad Company to "require their discontinuance of the discrimination alleged;" and an injunction, general in its terms, was prayed for to restrain the Chesapeake & Ohio Railway Company "from transporting *coal or any other property at less* than its published rates on file; or from doing *anything whatever* whereby any other advantage might be given or discrimination practiced;" and to restrain the New York, New Haven & Hartford Railroad Company "from accepting or receiving any rebate, concession or discrimination in respect to the transportation of *any property* in interstate or foreign commerce carried for it."

On the filing of the petition a temporary injunction was granted as prayed for. The respective defendants filed their several answers to the said petition denying any violation of the Interstate Commerce Act, and the cause was matured for hearing on affidavits and documentary evidence filed by the respective parties to the controversy.

Upon the hearing thereof, the Circuit Court, on February 19th, 1904, rendered its opinion, holding that the transaction complained of was *not* in violation of the 2d or 6th sections of the Interstate Commerce Act, as was contended, but *was* forbidden by the *3d section* of that Act. The Court also denied the prayer of the petitioner for a *general* injunction. A decree was entered in conformity with this opinion enjoining the defendants from further carrying out the contract between them under which the Chesapeake & Ohio Railway Company was delivering coal to the New York, New Haven & Hartford Railroad Company.

The contract which was made the basis of this proceeding originated as follows:

On December 3d, 1896, the Chesapeake & Ohio Railway Company, through M. E. Ingalls, its president, made a contract with the New York, New Haven & Hartford Railroad Company to furnish the latter company not to exceed 2,000,000 gross

tons of bituminous coal from mines along its line in such quantities monthly as wanted from July 1st, 1897, to July 1st, 1902, deliveries to be made in its bins on its line and not to exceed 400,000 tons per annum, at an agreed price of $2.75 per ton New Haven basis, settlements to be made monthly. The average price under this contract was $2.831 per ton. (See record p. 77.) A lithograph copy of this contract will be found on p. 190 of the record.

In July, 1897, the Chesapeake & Ohio Railway Company entered upon the discharge of this contract having previously arranged on December 11th, 1896, to obtain the coal from certain operators on its line in what is known as the New River District in West Virginia, at 70c per ton and subsequently, in April, 1898, having arranged with the Atlantic Transportation Company for water transportation from Newport News, Va., to New Haven, at 50c per ton. (See record pp. 69-72 and affidavit of M. E. Ingalls, record p. 112.)

When this contract was made it yielded about $1.35 per ton net to the Chespeake & Ohio Railway Company over all costs incident to the purchase and delivery of the coal; this was a handsome return, substantially equal to its share of its then existing *through* rate on coal destined beyond the capes, and in excess of its *specific* rates on similar coal subsequently fixed to Newport News, up to April 1903; and averaged a net return per ton to the Chesapeake & Ohio Railway Company of 98 1-2c throughout the life of said contract, including May and June 1903; this latter sum, in view of the magnitude of the tonnage called for by the said contract, bore a just relation to any tariff on similar coal on the line of the Chesapeake & Ohio Railway Company for Tidewater shipment.

The lower Court in holding that the contract was free from objection on this score said:

> "In the case at bar I am unable to find evidence of an intent to carry at less than the published rates of the C. & O. (Record p. 221.)

This contract was made at a time of extreme financial depression. In order to promote the interest of the Chesapeake & Ohio Railway Company and to help sustain the mines along its line the President of said Company sought and found a new market for New River coal; and the said contract, which was in nowise hidden or concealed, but which was known to every coal dealer on the Atlantic Coast, was welcomed by the operators on the line of the Chesapeake & Ohio Railway Company as the dawn of a brighter era in the business of mining coal.

In speaking about this contract Mr. Justus Collins, one of the largest coal operators in the New River District and the President of the New River Coal Operators' Association, said:

> "At the time that the said original contract for the delivery of the 2,000,000 tons of coal to the New York, New Haven and Hartford Railroad Company was made, the said contract was regarded by the coal operators as a most favorable and beneficial one for the New River District, and it continued to be absolutely so for at least three years of its existence. The affiant further says that he is now and has been for the past fifteen years engaged in large coal operations on the line of the Norfolk & Western Railway Company, and that at the time the said contract was made and for a considerable period thereafter the coal sold on the line of the Norfolk & Western Railway Company of like character only netted the said operators on the said Norfolk & Western Railway the sum of 59c per gross ton, whereas under the terms of the contract for that furnished the New York, New Haven & Hartford Railroad Company the same netted the operators not less than 70c per gross ton throughout its life." (Record p. 136.)

Samuel Dixon, who is extensively engaged in mining and shipping coal on the line of the Chesapeake & Ohio Railway Company, said:

> "The affiant further says that he is thoroughly familiar with the conditions surrounding the coal trade in the New

River District, and also in the Kanawha District; that he has known of the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for supplying 2,000,000 tons of coal at the rate of 400,000 tons per year ever since that contract was made; that he knows that at the time it was made it was a matter of common knowledge and considered an exceedingly beneficial contract to the operators of the New River District; that he knows that it continued to be an advantageous contract up to about the year 1900 when the price of labor advanced; that he knows that through and by means of said contract the coal operators in the New River District were enabled to get a better price for their coal than they would have gotten had the contract not been made." (Record pp. 131-2.)

All the testimony of the coal operators on the line of the C. & O. Ry. filed with the record is to the same effect.

President Ingalls speaking of this contract said:

"That in this whole matter he acted according to his judgment in the best interest of all concerned; that he regards the contract which the C. & O. Railway Company made through him with the N. Y., N. H. & H. R. R. Company, as having saved the C. & O. Railway Company a place in the market; having kept the mines along its lines going and the mine laborers employed therein at work and the said coal in the market; that said arrangement was of the greatest benefit not only to the C. & O. Railway Company, but to the community served by it known as the New River District. (Record p. 115.)

The Court could not but hold that this contract was made *uberrima fide*, and hence the learned judge in his able opinion said:

"In the case at bar I do not find anything which satisfies me that the C. & O. in making the contract of 1896 had any special design to give a rebate to the New Haven Company

or to any particular coal operators. In other words, I do not find here that the contract of 1896 was intended as a ruse or a device to evade the commerce act. The contract was made at a time of extreme financial depression. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

And in exonerating the New Haven Company from the charge of having received a "rebate or concession" on the coal delivered to it the court said:

"I can find no evidence in the record which satisfies me that in making the contract of 1896 the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

M. E. Ingalls was succeeded as President of the C. & O. Railway Company by George W. Stevens in February, 1900, and the new management continued to perform said contract which, about this time, became less profitable because of the advance in the cost of mining, producing a corresponding advance in the price of coal, and because of the failure of the Atlantic Tranportation Company to perform its contract for water transportation. (Affidavit of M. E. Ingalls—Record p. 115.)

The contract was substantially completed by July 1, 1902, and would have been fully completed but for the coal miners' strike which occurred *June 7, 1902,* which paralyzed the coal industry, enormously increased the price of coal, and caused practically an entire cessation of shipments on the line of the C. & O. Railway Company. When this untoward event occurred there remained undelivered under said contract only 59,966 tons. Subsequently, on January 12, 1903, the New Haven Railroad rendered a bill against the C. & O. Railway Company for $103,910.69 for the excess over contract price paid by the former Company for bituminous coal "purchased outside to make good shortage on contract." Of this bill the Court in its opinion said:

"This bill is alleged to be (and I find no evidence to the

contrary) the actual difference between the cost of the coal purchased by the New Haven Company from others and what would have been the cost of it had the C. & O. Railway Company fulfilled the contract of 1896. This demand, therefore, could not properly be considered an unadjusted or vague and unliquidated claim." (Record p. 217.)

The C. & O. Railway Company recognizing its obligation under its contract and desiring in good faith to discharge it, endeavored to induce the operators in the New River District, who theretofore had been furnishing the said Railway Company with the coal called for by its contract with the New Haven Company, to continue to supply the coal, but owing to the difficulties in producing coal incident to the coal miners' strike, and the enormously enhanced cost of production they were unwilling at that time to do so. (See affidavit of Samuel Dixon, Record p. 132 and affidavit of Justus Collins, Record p. 135.)

The President of the C. & O. Railway Company, being unable to procure the coal in the New River District, made a verbal arrangement with the President of the New Haven Company to deliver to said company the balance of 59,966 tons of *Kanawha coal* instead of New River coal, the New Haven Company consenting to accept the lower grade of coal and to release its claim for $103,910.69, which coal the C. & O. Railway Company arranged to get at the price of $1.28 per gross ton. (See affidavit of J. R. Thomas, Record p. 126.) Thereupon in the month of May, 1903 the C. & O. Railway Company commenced the delivery of Kanawha coal to the New Haven Company to complete the shortage under its contract of 59,966 tons, and by July 2, 1903, it had delivered 38,224 tons, leaving a balance of 21,742 tons to complete the tonnage called for by said contract. At this time (July 2, 1903) further shipments were suspended in consequence of a telegraphic summons from the Interstate Commerce Commission to the President of the C. & O. Railway Company to appear before that body in Washington to answer a charge that his company was discriminating in freight rates by

shipments of coal to the New Haven Company in May and June 1903. The President of the C. & O. Railway Company answered this summons by appearing in person before the Commission in Washington on July 3rd, at which time he ascertained that the summons had been issued on the complaint of W.C. Bullitt, who, on June 30, 1903, made the following affidavit, charging that the C. & O. Railway Company was engaged "in the carriage of freight traffic at less than its published rates on file, and was committing a discrimination forbidden by law:"

"City of Washington |
District of Columbia |

ss.

"This day personally appeared before the undersigned, Martin S. Decker, Notary Public for the City of Washington and District aforesaid, William C. Bullitt, and being by me duly sworn deposed and saith:

"First. That he is engaged in the businesss of selling coal and that his place of business is the Arcade Building, Philadelphia, Pennsylvania.

"Second. That he has been offered coal in the Kanawha District on the line of the Chesapeake & Ohio Railway Company in the State of West Virginia at a price which is very attractive to him, and which he wishes to purchase; and desiring to remove the same to Newport News for shipment beyond the capes of the Cheseapeake, he applied to the Chesapeake & Ohio Railway Company for a freight rate on coal from the said Kanawha District of West Virginia to Newport News, which said coal was to be shipped beyond the capes of the Chesapeake.

"To his application for rates, as aforesaid, the Chesapeake & Ohio Railway Company replied that the rate on coal from the Kanawha District to tidewater, for shipment beyond the capes, is one dollar and forty-five cents ($1.45) per ton, which freight rate has prevented complainant from purchasing the coal offered to him as aforesaid in the

Kanawha District of West Virginia, as under this rate he could not afford to move the same at present.

"Affiant further saith that he is informed and believes that during the spring of 1903 the Chesapeake & Ohio Railway Company made a contract to carry a large amount of coal to wit, sixty thousand (60,000) tons from the Kanawha District of West Virginia to tidewater, for shipment to New Haven, for the New York, New Haven & Hartford Railroad Company, from which said traffic the Chesapeake & Ohio Railway Company will realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton; at least affiant is informed and believes that the rate the Chesapeake & Ohio Railway Company will receive on this traffic is far below the published rate of $1.45 above set forth.

"Affiant further states that he is informed and believes that the Chesapeake & Ohio Railway Company is now engaged in carrying the sixty thousand (60,000) tons of coal aforesaid, and that out of that amount it has already carried and delivered at least twenty-five thousand (25,000) tons, at a rate far below its published rate aforesaid.

"Affiant further says that he is informed and believes that the Chesapeake & Ohio Railway Company undertakes to justify this course on the ground that in 1896 a contract was made by the Chesapeake & Ohio Railway Company with the New York, New Haven & Hartford Railroad Company by which the former sold and agreed to deliver to the latter two millions (2,000,000) of tons of best quality of coal on or before the 1st day of July, 1902, delivery to begin July 1st, 1897, and not to exceed four hundred thousand (400,000) tons per annum. The price to be paid by the New York, New Haven & Hartford Railroad Company to the Chesapeake & Ohio Railway Company for this coal was two dollars and seventy-five cents ($2.75) per ton on the New Haven basis.

"Affiant says that he is informed and believes that during

the life of this contract up to and including the month of June, 1902 (after which time deliveries ceased), the Chesapeake & Ohio Railway Company had failed to deliver about sixty thousand (60,000) tons of coal required by the contract aforesaid.

"Affiant further says that he is informed and believes that this contract was illegal and void and that the Chesapeake & Ohio Railway Company had no power to make such a contract; and affiant verily believes that the contract for this coal was at such a price that the freight rate thereon to be received by the Chesapeake & Ohio Railway Company was far below its published rates.

"Affiant further says that he is informed and believes that some months after the contract aforesaid had expired the New York, New Haven & Hartford Railroad Company rendered a bill to the Chesapeake and Ohio Railway Company for something over one hundred thousand ($100,000) dollars damages for failure to deliver the coal called for by the contract aforesaid; and during the winter of 1902-1903 the President of the Chesapeake & Ohio Railway Company arranged a new contract between the New York, New Haven & Hartford Railroad Company, through a coal broker, by name Wittenburg, and a coal operator in the Kanawha District, by the name of Thomas, by which it was agreed that Thomas should ship sixty thousand (60,000) tons of coal from the Kanawha District to the New York, New Haven & Hartford Railroad Company at $2.75 per ton, said coal to be delivered prior to July 31, 1903.

"Affiant further states that he is informed and believes that the cost of delivery of this coal per ton to New Haven, not including the freight rate to the Chesapeake & Ohio Railway Company from the Kanawha District to Newport News, is as follows:

By paid to Thomas, per ton	$1.28
Commission to broker	.05
Ocean rates	about 1.00
Discharging	19
Total	$2.52

"So that the Chesapeake & Ohio Raiway Company realizes from this traffic about twenty-three ($.23) cents per ton for carrying coal from the Kanawha District to Newport News for shipment beyond the capes of the Chesapeake and the published tariff of the Chesapeake & Ohio Railway Company for like coal from the same district to the same destination is one dollar and forty-five ($1.45) cents per ton.

"Affiant is informed and believes that the Chesapeake & Ohio Railway Company claims that by this arrangement it is paying off a claim against it asserted by the New York, New Haven & Hartford Railroad Company; but affiant is informed and believes that the said claim against the Chesapeake & Ohio Railway Company is not a valid, legal demand and that the delivery of this coal to the New York, New Haven & Hartford Railroad Company at the rate to be received by the Chesapeake & Ohio Railway Company is a discrimination against all the other coal produced in the Kanawha District, and prevents affiant from moving the coal in the Kanawha District which has been offered to him as aforesaid.

(Signed) WILLIAM C. BULLITT.

"Subscribed and sworn to before me this 30th day of June, 1903.

(Signed) MARTIN S. DECKER,

(L. S.) NOTARY PUBLIC.

Record pp. 8, 9, 10-11

Thereupon the Interstate Commerce Commission instituted this proceeding based on the foregoing affidavit.

It will be noted that this proceeding was set on foot more than six years after the contract with the New Haven Company was made, and at a time when a mere remnant of the immense tonnage called for by said contract remained undelivered. The affiant, the said W. C. Bullitt, is a member of the firm of Castner, Curran & Bullitt, coal brokers, whose operations are confined to the sale of "Pocahontas" coal produced on the line of the Norfolk & Western Railway, which is an entirely different grade of coal from that produced in the Kanawha District on the line of the C. & O. Railway. The said Bullitt was never interested in the purchase or sale or transportation of a ton of coal produced on the line of the C. & O. Railway. He was a coal broker, engaged in the sale of coal produced on another line, and as such, he had known of the contract now under consideration long before he set this proceeding on foot; that he was familiar with its exact terms is shown by the detailed statement in relation to it made in his affidavit. With the amplest knowledge of the nature and terms of the contract practically during its existence, the inquiry naturally suggests itself why he should have waited more than six years, and until the contract was substantially completed, to make complaint against it if he deemed it an improper contract for the C. & O. Railway Company to perform. In his affidavit he states that he had been "offered coal in the Kanawha District on the line of the C. & O. Railway Company in West Virginia at a price which was very attractive to him and which he wished to purchase . . . . :that he applied to the C. & O. Railway Company for a rate on coal from the Kanawha District to New Haven . . . . and to his application the Railway Company replied that its rate on said coal was $1.45 per ton, which rate prevented him from purchasing the coal offered him, as under said rate he could not afford to move the coal *at present.*" But he did not state how much coal had been offered him or by whom or at what price, or the rate which he applied for. The C. & O. Railway Company produced and filed in the record the affidavits of practically all the operators in the Kanawha and New River

Districts who produced or handled coal for tidewater shipments; and each one denied that the said Bullitt had ever applied to him to purchase Kanawha coal, or coal of any other grade on the line of the C. & O. Railway, or that he had, to their knowledge, ever been interested in the production or transportation of coal on the line of said railway. In response to these affidavits, and in explanation of his statement, the said Bullitt made another affidavit on the 13th day of November, 1903, and filed with the record (pp. 143-4), naming J. W. Hopkins, of Richmond, Virginia, as the person who had offered to sell him Kanawha coal not to exceed 1,000 tons per day "at a price which was satisfactory had he been able *to secure the reduction in freight rate* which he thereupon applied for to the C. & O. Railway Company." In this second affidavit he did not mention the "price" at which the coal was alleged to have been offered him or the "rate" for which he applied. J. W. Hopkins, in an affidavit dated November 27, 1903, and filed with the record (p. 172) denied that he had ever "offered to sell the said Bullitt such quantity of Kanawha coal as he might wish to buy not to exceed 1,000 tons per day or in any other quantity," or had ever been applied to by the said Bullitt for a quotation on Kanawha coal "for the purpose of making an actual purchase," and that "he had never sold Kanawha coal to the said Bullitt or his firm, or been asked for prices on said coal with the understanding that the said Bullitt contemplated becoming a purchaser." To this affidavit the said Bullitt, although he had the opportunity to further explain, made no response.

It will be observed that he did not claim that he was a *shipper* but that he *might have been* "if he had been able to secure the reduction in freight rate which he thereupon applied for." If his statement be accepted as true the fair inference from it is that if the C. & O. Railway Company had violated its published tariff and given him the "reduction in freight rate (whatever it was) for which he applied" he would have had no complaint to make against the New Haven contract, and this proceeding would not have been started. In other words, that his real griev-

ance was not that the C. & O. Railway Company was violating the law, but that it would not violate it for his benefit.

ARGUMENT.

The petition filed by the Interstate Commerce Commission alleged that in delivering the coal in May and June, 1903, to complete the tonnage called for by its contract with the New Haven Company the C. & O. Railway Company was engaged in "the carriage of freight traffic at less than its published rates on file and was committing discrimination forbidden by law." There was no complaint that the published rates were excessive or unreasonable, but the petition was based upon the alleged violation of the *2nd* and *6th sections* of the Interstate Commerce Law, which forbid a departure from the published freight rate, or the charging of one person a higher rate than another for transporting traffic of the same kind and under substantially similar circumstances. It is alleged that this discrimination is shown by the fact that the C. & O. Railway Company did not realize out of the price obtained for the coal delivered in May and June 1903, after payment of the cost of the same and the expense of transportation more than 23c per ton to represent the freight earned, whereas its published rate on file for the transportation of similar coal to tidewater was $1.45 per ton. The fact is that the C. & O. Railway Company not only realized 39 1-2c net for each ton of coal delivered in May and June 1903 over all cost and expense incident to its purchase and delivery, but also settled a liquidated claim against it amounting to $103,910.69, which amount should be taken into account in any just estimate of the consideration to be received on the one side and to be paid on the other for the coal furnished and to be furnished on account of the remnant due under its contract with the New Haven Road; but notwithstanding the fact that the charge of discrimination in freight rate set up in the petition is predicated solely on the

price of said coal, the petition takes no account of said claim as a part of the consideration.

But it is apparent that this matter did not involve a question of transportation or rates. The New Haven Company was not a shipper of coal and had no interest in the freight charges of the C. & O. Railway and could not be benefited or injured by the reduction or increase of such charges. The purpose of section II is to prevent unjust discrimination between shippers. (*Tex. and Pac. R. R. Company* v. *I. C. C.*, 162 U. S. p. 219.) There must be *competition between shippers* before there can be unjust discrimination. No such question is presented by this record. The New Haven Company made no contract for transportation, and the question of transportation as such is not involved in this case. The New Haven Road simply bought coal from the C. & O. Railway Company as it would have bought it from any other seller at a fixed price to be delivered in its bins on its line. The C. & O. Railway Company was the *vendor* of the coal as well as the *carrier*. The Interstate Commerce Act does not forbid a carrier to be interested in a commodity transported by it—nor does it undertake to regulate or prescribe prices at which articles shall be sold, in order to realize established freight rates thereon. A carrier may in good faith engage in transporting a commodity of which it is the owner, or in which it is interested, and if it sustains a loss on the transaction, such loss would be in its capacity as *dealer* and not as *carrier*. This question was considered by the Interstate Commerce Commission in the case of *Haddock* v. *Del. &c. R. R. Co.*, 4 I. C. C. Reports 266, and in the case of *Coxe Bros.* v. *the Lehigh &c R. R. Company*, 4 I. C. C. Reports 535. In the former case, decided in 1890, it was held that when the carrier is the owner of or interested in the commodity transported, the provision against unjust discrimination, etc., does not apply ; and that in such case the only question which could be inquired into was as to the *reasonableness of the published rate*. The Commission, speaking through Judge Cooley, its chairman, said:

> "The question, then, as between the complainant and the respondent in this case should rather be called a question of reasonable rates than a question of unjust discrimination, for the reason that as already shown, there is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that we must now assume we can in nowise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined."

In the case of *Coxe Bros.* v. *Lehigh &c. R. R. Company*, decided in 1891, it appeared that the Railroad Company owned all the stock of the Lehigh Valley Coal Company (as the C. & O. Railway Company might do in respect to coal operations on its line—Act of Assembly of Virginia approved December 18, 1889—Record p. 112), which latter company shipped its output over the line of the Lehigh Valley Railroad, and complaint was made by a *shipper* of similar coal that the price obtained by the Lehigh Valley Railroad Company for the coal so transported, after deducting all expenses and costs of delivery, left a sum remaining considerably less than the regular rate which the said railroad company was charging for transporting similar traffic over its line for others. This charge was made by Coxe Bros. & Company, *shippers of similar coal* over the Lehigh Valley Railroad to the same destination, and their complaint was stated as follows:

> "That the said Lehigh Valley Railroad Company, either directly in its own name or indirectly in the name of the Lehigh Valley Coal Company aforesaid, is now, and has been for some time past, purchasing anthracite coal in the anthracite regions of Pennsylvania and transporting the same as interstate commerce to tidewater on the coast of New Jersey, over the same lines as those over which the complainants are shipping anthracite coal, and selling the said coal so purchased at tidewater at such prices, that, after deducting therefrom the price at which the said coal was purchased, and a reasonable and proper allowance for shipping

and selling expenses, there remains as the revenue or receipts for transporting a much less sum than that charged by the Lehigh Valley Railroad Company to the petitioners and public generally for a like and contemporaneous service in the transportation of anthracite coal transported under substantially similar circumstances and conditions."

The Interstate Commerce Cimmission, through its chairman, Judge Morrison, held that this was not a case in which the rule against unjust discrimination could be applied, and that the only question to be determined was whether the Lehigh Valley Railroad Company imposed on other shippers a *reasonable rate* as compared with the profit realized by it on coal shipped on its own account. The proposition is thus stated in the syllabus:

"A railroad company carrying coal as interstate traffic is the owner of the capital stock of a coal company, which under its charter holds lands, mines, buys and sells coal, and ships over the lines of said railway company. *Held,* where such conditions result in violations of the Act to regulate Commerce, the only regulation practicable is the enforcement of the provision of the Act requiring rates to be reasonable."

Judge Morrison, in the course of his opinion, said:

"The fact that the Railroad Company, directly as a carrier and indirectly as a coal company and an operator, so conducts the business of buying, shipping, carrying and selling coal that the road realized less for transportation than its established rates, affords evidence of the defendant's readiness to take the freight at less than full charge, and justifies the conclusion that the charges to others are to some extent excessive."

The foregoing cases are similar in their statement of facts to the case at bar. There the Railroad Company, as in this case, was both *vendor* and *carrier* of the coal, and the Interstate Commerce Commission, speaking through Judges Cooley and Morrison, arrived at the conclusion that the only question which

could be inquired into, under the Interstate Commerce Act, was as to the reasonableness of the published rate. The reasonableness of the published rate of the C. & O. Railway Company is not the subject of complaint in this case, and no inquiry was made concerning it.

The opinions of such eminent jurists as Judges Cooley and Morrison are entitled to the respectful consideration of any court.

The lower court in the course of a very able discussion of this question held that there had been no violation of sections II. and VI. of the Interstate Commerce Act; that any loss suffered by the C. & O. Railway Company under its contract with the New Haven Company should not be treated as a reduction in freight rates, and did not, therfore, constitute a violation of sections II. and VI. but should be treated as a loss sustained by the C. & O. Railway as a vendor of the article transported. The court in the course of its opinion said:

> "Can an interstate carrier buy and then sell articles, to be carried over its own line, at a price less than the aggregate of the cost and expense items and its own published freight rate? Always excepting cases where such dealings are mere devices to cover an intentional giving of a less rate for carriage to some than to others, it seems to me that this question must be answered in the affirmative in so far as the second section of the act applies. . . (Record p. 220.)
>
> "A statute which goes no further than to forbid carrying for one at less than the price charged others is not sufficient warrant for holding that a loss suffered by a carrier-vendor has to be considered as a loss on carriage. If there were a Federal statute forbidding a carrier to become a dealer or if there were a statute forbidding a carrier dealer to sell articles of transport at less than the aggregate of all cost items and its own published freight rate, or if there were a statute providing that in such cases all losses

must be treated as losses on carriers, the way would be clear. But, with the law as it is, in so far as the second section of the act goes, I fail to find authority for saying that loss under such a contract must necessarily be treated as a loss on carriage. Failing to find, so far, any law forbidding the carrier-dealer to suffer a loss as dealer, we are met always with the unanswerable proposition that the loss under such a contract can just as properly be treated as a loss suffered as dealer as it can as a loss on carriage. . . . (Record p. 221.)

"As before remarked, to say that the losses suffered by the C. & O. must be treated as a carriage at a too low rate is to assert that the honest losses of a vendor-carrier must be treated as reductions in freight rates, and can not be treated as dealer's losses. To so hold is to lose sight of the carrier's relation to the transaction as vendor. . . .

"Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the 2nd section of the act.

"No discussion of the 6th section of the act is necessary. If the transactions prior to 1903 did not violate the 2nd section, they did not violate the 6th section." (Record, pp. 222-3).

It was next asserted in the petition of the Interstate Commerce Commission that the New Haven contract was "illegal and void and that the C. & O. Railway Company had no power to make such a contract." This is equivalent to saying that if the C. & O. Railway Company possessed corporate power to make the contract, the acts complained of would not have been in violation of the Interstate Commerce law. The fact however that the Railroad Company had corporate power to make the contract would not make *lawful* what would be *unlawful* without such power. The contract

having been made in good faith the question whether or not it is *ultra vires* is not a question to be considered by the Interstate Commerce Commission, and cannot be raised collaterally or considered in this case. In the Coxe case already quoted from, Judge Morrison said:

> "The legal right of the Lehigh Valley Railroad Company to take and hold the capital stock of the Lehigh Valley Coal Company, and the right of said Coal Company to mine, buy, ship and sell coal is not raised in this proceeding, and if such right were raised and challenged, this commission would have no authority to determine it. . . . The authority of this Commission extends to such abuses only as are not in conflict with the act to regulate commerce or some of its provisions."

The lower court decided this question adversely to the contention of the Interstate Commerce Commission, saying in the course of its opinion:

> "But until some one having the right so to do has the contract of 1896 declared by a court of competent jurisdiction void on the ground of *ultra vires*, I do not perceive that we have here any right to consider the question (see 4 Thomp. Corp., 5638; 5 *ibid.*, sections 6030, 6032 6033, 6034.) For reasons of business policy, both the managers of the C. & O. and its stockholders, so far as here appears, prefer not to raise the question of *ultra vires*. The State of Virginia has not raised it, and no creditor has raised it. No Federal law has been contravened by this contract (in so far merely as it is *ultra vires*), and I do not perceive the right of the Interstate Commerce Commission to raise the question here." (See Record, pp. 217-8.)

The court having thus disposed of the case stated in the petition adverse to the contention of the Interstate Commerce Commission, nevertheless held that the contract of 1896, though valid when made, subsequently became invalid under SECTION III of the Commerce Act by reason of the fact that the contract,

because of the increased cost of delivering the coal, subsequently became unprofitable to the C. & O. Ry. and thereby resulted in an undue preference to the New Haven Company, and an undue prejudice to some party or parties unknown, and that the demand of said company in April, 1903, for $103,910.69 for damages for breach of said contract was, therefore, an illegal and unenforceable demand.

We submit that the conclusion of the court was not justified by the case stated or proved, as there was no allegation in the petition that this section had been violated, and no proof was introduced on that theory, nor was any fact alleged which, if proved, constituted an offence against said section. *Texas &c. R. R. Co.* v. *I. C. C.*, 162 U. S. 238.

The petition was based on the theory that sections II and VI had been violated. Section II as we have seen, relates solely to monies exacted unjustly from the *individual shipper* in excess of monies received from any other *shipper* for a like service, and section VI forbids a departure from the published freight rate. The Court held that neither of these sections had been violated. The protection afforded by section III relates to any unjust advantage, or preference, given to any *particular person*, or to a *locality*, or with regard to any particular *description of traffic*, or to any unjust *discrimination* by one *carrier against another carrier* as to rates, charges or facilities in operating connecting lines, or in making joint rates over connecting lines.

None of these offences is charged, or proved, nor was it contended that the New Haven Company received any preference such as is contemplated by this section.

In commenting on the third section the court said:

> "We are now, therefore, brought to consider if the transactions in question prior to 1903 either gave someone an undue advantage or caused someone an undue prejudice in any request whatsoever. . . . The third section is very comprehensive and broad. A prejudice to any one in any respect is forbidden." (Record p. 224.)

The reasoning of the court was to the effect that if other coal from the line of the C. & O. Railway Company went to New York or New England during the period covered by the New Haven contract prior to April, 1903, then the New Haven Company got its coal on better terms than some other consumer, and some one suffered a comparative prejudice—either a "New York or New England consumer," or else "some coal operator or some coal dealer or some water carrier." But the court said:

> "I cannot from the evidence say just who suffered this comparative prejudice, but it is sufficient if any one did." (Record p. 224.)

By parity of reasoning it may be said that if no one was prejudiced, there was no violation of the law. The decision of the court is based on the theory that "other coal was shipped over the line of the C. & O. Railway to New York or New England points during the period covered by the New Haven contract," from which the court concludes that some one must have been prejudiced. But no one has complained, and the court is unable to say who was prejudiced. Assuming that other coal was shipped to New York or New England points, it does not appear by whom or when it was so shipped, or to what points or to whom, or what price was paid for the coal at the mines, or what price was realized from the sale of it.

The Interstate Commerce Law is not a system of hard and fast rules to be applied without proof; before a party can be convicted of an offence under the law, and be subjected to its pains and penalties, the offence must be specifically charged and clearly proved.

The Court being unable to say from the evidence just who, if any one, suffered "a comparative prejudice," we submit that there was no basis for its conclusion that the law was violated.

In a supplemental opinion the court held that the contract of 1896 resulted in a violation of that provision of the third section, which forbid any undue or unreasonable prejudice to any "particular description of traffic." On this point the court said:

"The third section of the Commerce Act forbids that any 'particular description of traffic' be subjected to an undue or unreasonable prejudice or disadvantage. Traffic can be subjected to a disadvantage only when some or all of the persons concerned with such traffic are subjected to disadvantage. If either the producers of, or the water carriers of, or the consumers of the Kanawha coal which went to New York or New England for others than the New Haven Company, suffered a disadvantage, then this traffic suffered such disadvantage. I am inclined to think that the use of the expression 'any particular description of traffic' is sufficient to show that it is not necessary for the complainant either to allege the names of the persons thus prejudiced, or to prove who the particular persons are. Having found that some or all of the persons concerned with the Kanawha coal destined for points 'beyond the Capes' other than that for the New Haven Company, were subjected to an undue disadvantage, it follows that I have found that this particular traffic has been subjected to such disadvantage." (Record pp. 230-31.)

The conclusion of the court that a "particular kind of traffic" had suffered disadvantage is based upon a finding of fact that "some person or persons" had been prejudiced. But this finding of fact, which is wholly indefinite as to persons, and time, place, character, extent and manner of the supposed prejudice, is qualified by the statement of the court that it is "unable to say who suffered" the supposed disadvantage. A finding involving penal liabilty should be supported by clear and specific proof, and the court could not be in doubt as to facts essential to constitute the offence if its finding of fact were based on sufficient evidence. If the finding of fact was not supported by sufficient evidence the conclusion based on it falls with it.

But even if the finding of fact be accepted as correct, the conclusion would not follow that there had been discrimination against any "particular kind of traffic." Unjust discrimination

between *shippers* engaged in the *same kind of traffic* is a discrimination against the *individual*, and not against the traffic in which he is engaged. Discrimination against an *individual* and discrimination against any *particular kind of traffic* are separate offences. In order that there may be discrimination in regard to any "particular description of traffic," it must appear that some *other description of traffic* is unduly favored in respect to freight rates, or facilities furnished for its movement. It is not even suggested that any other description of traffic over the line of the C. & O. Railway Company enjoyed any facility or advantage over the coal traffic carried on over said line; nor does it appear in this case that the C. & O. Railway Company was engaged in carrying any other kind of traffic than coal.

In holding that the New Haven contract of 1896 subsequently became invalid under Section III because of a change in conditions affecting the price of coal, the court said:

> "I am fully convinced that if a carrier-vendor makes a contract such as we have here under consideration at a time when the contract price will pay, or will practically pay, all cost items and the published freight rate of the carrier, such contract does not become illegal, if for reasons beyond the carrier's control the cost items rise somewhat, if not too much above the prices prevailing when the contract was made. But the very gist of the case lies in the amount of this increase in the cost items. . . .
>
> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays the cost items and its own published freight charges, yet, whenever the cost items so substantially rise that the loss to the carrier (as dealer) and the subsequent advantage to the purchaser-consignee, or to the disadvantage to someone else becomes unreasonable or undue, such sales become (or such contract becomes) illegal. When such a state of facts comes to exist the carrier must plead the illegality of such contract and cease to perform it. . . .

"The conclusion I have reached gives a carrier a right to cease to perform contracts made in good faith whenever the cost of the article or the other cost items go to such a point that the contract price does not equal (or practically equal) the cost items and the carrier's published freight rates." (Record pp. 225-6.)

Nothing could be more contradictory of the views customarily held than the conclusion of the Court as here announced, which is to the effect that one of the parties to a valid contract has the right to 'cease to perform' it, when it finds itself on the losing side.

We submit that if the contract was valid in its inception, as the court holds it to be, it could not become invalid by reason of the fact that *conditions* subsequently made the contract less profitable than when it was made. The rule is that a contract valid in its inception continues valid, even as against subsequent *legislation*. The legislature itself cannot impair the obligation of a contract, though it may declare that similar contracts shall be invalid. The only exception to this rule relates to a contract made with reference to a matter which is a subject of *state or national legislation and control;* such a contract may become invalid if it conflicts with *legislation* subsequently enacted regulating the subject of the contract. But in this case the contract is adjudged to be invalid not because it was in conflict with the *Interstate Commerce Act when made*, and not because it conflicts with subsequent *legislation*, but because *conditions* beyond the ken or control of the parties to the contract subsequently intervened which diminished the profits derived from the same by the C. & O. Railway Company.

The cases cited by the court in support of this conclusion are not analogous to the case at bar. They were cases wherein the contracts were held to be invalid *in their inception*, or where, relating to a matter subject to legislative control, they conflicted with *legislation subsequently enacted* regulating the subject of said contracts, or where there was a conflict between a state statute and the national law operating on the same subject matter,

in which latter case the state statute had to yield. But no case has been cited and we are not aware of any which holds that a contract, valid when made, can be rendered invalid by a change of *circumstances or conditions affecting its results.*

If the conclusion of the court be sound, it is equivalent to a denial of the right to a railroad company to be the carrier of coal or any other traffic as interstate commerce of which it is the owner, as no one would be willing to enter upon a contract which depended for its stability upon such an uncertain element as the cost of labor or other circumstances which might affect the result of said contract.

We respectfully submit that the court erred in holding the contract of 1896 void under the third section of the Interstate Commerce Act.

DECREE OF THE COURT.

The lower court, for the reasons heretofore stated, having found the contract of 1896 obnoxious to the third section of the Commerce Act, the Interstate Commerce Commission strenuously contended for an "omnibus" injunction requiring the C. & O. Ry. to observe its published tariffs "in respect to all carriage for all persons," and not to give to the New Haven Company "or to any other person, firm or corporation any undue or unreasonable preference or advantage," but the court refused to enter such an order, and entered an order to enjoin the C. & O. Railway Company from further carrying out the specific transaction against which complaint was made, and which had been adjudged illegal. Thereupon the Interstate Commerce Commission made a motion to enlarge this order in the manner contended for by it, and after full argument this motion was overruled. This action of the court in refusing to grant an "omnibus" injunction is the ground upon which the Interstate Commerce Commission is prosecuting this appeal. The scope of the injunction contended for by the Interstate Commerce Commission is thus set forth in its first assignment of error:

"That the said court merely enjoined and restrained the C. & O. Ry. Co., its officers, agents, and employes from, in any manner, direct or indirect, executing or performing or attempting to execute or perform either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements or either of them; whereas said court should have further enjoined and restrained the C. & O. Ry. Co. from giving to said railroad company, *or to any other person, firm or company,* any undue or unreasonable advantage or preference, and should further have restrained and enjoined the C. & O. Ry. Co. from transporting coal from one state to or through any other state, for the New York, New Haven & Hartford Railroad company, *or for any firm, person or company,* at a less rate than the duly established freight rate of the said railway company in force at the time, and *from further failing to observe its published tariffs,* or from giving to the said N. Y., N. H. & H. R. R. Co., *or to any person, firm or company, in any manner whatsoever, any undue or unreasonable preference or advantage,* and said decree entered by the court, on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the N. Y., N. H. & H. R. R. Co. and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the C. & O. Ry. Co. on any interstate commerce and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage." (Record, pp. 241-2.)

The following extracts from a written argument filed by counsel for the complainant in the court below will show the grounds on which the Interstate Commerce Commission based its contention for this injunction.

"The defendants, the Railway Company and the Railroad Company, are shown to have been *violators of the law,* and the purpose of the injunction is to *compel obedience to the law as contained in the Act to regulate commerce,* and the Acts amendatory and supplementary thereto. The particular violation shown only indicates the attitude of the defendants towards the enactment of Congress.

"The defendants are not being tried for the commission of specific offences, but they are brought before the Court in a special proceeding for the purpose of being required to *observe their statutory obligations,* and if disregard of their legal duties is shown, then we urge that the court has ample authority, and should by injunction prohibit them from doing not only what they are shown to have done, but all acts of a kindred nature in violation of the Act to regulate commerce.

"The temporary injunction in this case was clearly granted upon the view that the carriers were *violators of the law,* as indicated by specific acts appearing in the record, and that they should be restrained from violating the law not only in the specific instances mentioned, but as to all interstate traffic they may carry or be interested in, respectively. And the permanent injunction should cover the same ground.

"The remedy by injunction, which is now expressly provided by the statute, is designed to prevent wrongs of this character, and plainly the theory upon which it is based is that upon showing the course or practice of violating the law in respect to the observance of tariff rates, or discrimination, that the whole course or practice, no matter to what specific articles it may have been applied, should be discontinued."

The gist of the argument seems to be that a single transgression of the Interstate Commerce Law shows "a course or practice of violating the law" and should therefore be punished by putting the offender under a general injunction not to violate the

law. According to this argument, if the defendant Railway Companies failed in a single instance (however innocently) to *"observe their statutory obligations"* the law requires them to be put under a general injunction to observe *all* of their "statutory obligations"—or, in other words, that they must thereafter conduct their business at the peril of a summons for contempt.

POWER OF THE COURT TO ENTER A GENERAL INJUNCTION.

It is not competent for the court to enter a general order commanding a defendant not to violate the Interstate Commerce Law; in such an injunction the court can simply *declare the law,* but has not before it any *specific* case to be adjudicated. It is fundamental that the defendant must be specifically informed as to what he is restrained from doing, and the court could not do more lawfully than enjoin the defendants from executing the specific act complained of.

BILL MUST BE SPECIFIC.

"In a suit for injunction the pleader must allege the facts entitling him to an injunction with precision and certainty, so as to distinctly inform the defendant of the nature of the case which he is called upon to meet, and if the bill contains only vague and indefinite allegations a demurrer will be sustained." (Ency. Pl. & Pr., Vol. 10, p. 923 and cases cited.)

"On an application for an injunction the facts relied upon must be clearly and positively alleged, and may not be inferred from the facts stated." (22 Minn. p. 437.)

ORDER MUST BE SPECIFIC.

"An injunction order should show upon its face all those things which it is necessary for the defendant to know in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby

restrained from doing without calling upon him for inferences, or any conclusions only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion, either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing or series of things to be clearly pointed out and described." (*Lyon* v. *Blotchford*, (N. Y.) 25 Hun. 57.)

"As the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction." (*Laurie* v. *Laurie* (N. Y.) 9th Paige's Chancery Report, 234.)

"The writ of injunction should contain a description of the particular things or acts concerning which the defendant is enjoined in order that there may be no opportunity for misapprehension. No particular form, however, is required, and the writ will, of course, be varied to meet the peculiar circumstances of each particular case. It is sufficient that it be an authentic notification to the defendant of the mandate of the court, which he must then obey at his peril." (High on Inj., 2 Edition, Vol. 1, p. 30.)

"The injunction should in itself contain sufficient to apprise the party upon whom it is served what he is restrained from doing; without the necessity of resorting to the complainant's bill to ascertain what the injunction means . . . When an injunction has been granted by the proper officer, acting within his powers and jurisdiction under the rules of the Court, the defendant upon whom the same is served must not be permitted to speculate upon what may be the decision of the Court upon the equity of the bill upon which the injunction has been allowed."

(*Sullivan* v. *Judah*, 4 Paige's Chancery Reports (N. Y.), p. 444.)

"The injunction is not definite . . . The writ of injunction ought to be sufficiently explicit upon its face, by defining the property or matter enjoined, so that a party may thereby be clearly advertised of what he is to do." (*Moat* v. *Holbein*, 2d Edward's Chancery Reports (N. Y.), p. 188.)

"The person enjoined is entitled to know with reasonable certainty what acts he may or may not do without making himself liable as in contempt of an order." *Robinson* v. *Clapp* (Conn.) 29 L. R. A., 592.)

"The writ as a general rule, ought to contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject." (*Whipple* v. *Hutchinson*, 4 Blatchford, 190.)

"This rule was expressed in the above case by Justice Nelson. This rule is approved in High on Injunctions (1st Edition) page 26, section 38. In reason it ought not to be left to a defendant to ascertain from what acts he is enjoined." (*St. Louis Min. and Mill Company* v. *Montana Min. Company*, 58 Fed. Rep., p. 129.)

"In *So. Ry. Co.* v. *Mechanics Local Union*, 111 Fed. Rep., page 58, Judge Hammond refused a general 'sweeping injunction' and held that 'the relief sought should be from the commission of specific acts charged in the bill.'"

From the foregoing it will appear that before the Court will exercise the power of injunction, the bill must specifically allege the thing or act to be restrained, and the order must clearly and definitely put the defendant on notice of what he "may or may not do without making himself liable as in contempt of the order."

Injunctions are granted upon a showing that in a particular case a wrong has been done or is threatened, and the doing of the particular wrong is enjoined. The allegations of the bill must be clear and definite in support of the right asserted, and

the order must plainly specify what the defendant is restrained from doing.

Would it be competent in this case for the Court to enter an injunction upon the general allegation that the defendant was violating the Interstate Commerce Law? Unless some specific act is alleged which constitutes that violation, the Court could not interpose, and if such act is alleged, it can only interpose to prevent it from being done. If the Court can enter in this case a general injunction against any and all future violations of the law, then why should it wait for its violation by any other railroad? It might as well issue a writ convening all the railroad companies within its jurisdiction and put them under a general injunction to obey at their peril every part of the act under penalty of contempt proceedings.

A general injunction could not be justified on the ground that the defendants in this case are conspirators, or persistent law-breakers; they have been absolved by the Court from all intention of wrongdoing; the single isolated transaction called in question has been held by the Court to constitute a violation of the Interstate Commerce Law because of commercial conditions which the defendants could neither foresee nor control. But it is said this "*particular* violation only indicates the *attitude* of the defendant towards the enactment of Congress;" that it shows a "*course or practice* of violating the law." How, it might be asked, can a "course or practice" be shown by a single act? This argument, moreover, is not supported by a scintilla of evidence, or even by an averment. The petition does not contain a single averment of an intent or threat on the part of the C. & O. Railway to violate the law, or that it had at any other time or in any other manner violated it; and no testimony was introduced on that subject. Yet it is gravely asserted that the defendant company had been convicted of a "course or practice of violating the law."

The "attitude" of the C. & O. Railway Company to the "enactment of Congress" is shown in the following extract from

the testimony of President Stevens before the Interstate Commerce Commission on July 3, 1903:

> "There is no company that is doing business that has been a more faithful adherent to its published tariff rates since February, 1900, than the Chesapeake & Ohio, and there has not been one rate made that has not been published with you gentlemen and adhered to; and if we made a reduced rate, we gave you the proper notice. I will challenge anybody to prove that we have made a rate in the last three years that we did not publish with the Commission and did not adhere to." (Record p. 27.)

That challenge was made on the very threshold of this proceeding. It was not accepted. The petition which was prepared and filed subsequently was silent on the subject, and no attempt even was made to controvert that statement by evidence. If it had not been *literally true,* it would have been easy to expose its falsity.

The general injunction proposed is as broad as the mandate of the law itself. If the defendant was charged with violating the law, however, it would be entitled to certain constitutional guarantees, such as presentation and trial by jury, whereas, if it was charged with violating the general mandate of this Court, its violation is tried in a summary way without the right of trial by jury, and punishment, involving fine and imprisonment, in addition to that prescribed by the Interstate Commerce Law, would be inflicted.

Section 2 of article 3 of the Federal Constitution provides that "the trial of all crimes except in cases of impeachment shall be by jury."

Would it not be an invasion of this constitutional right for the Court or the legislature to put a defendant under a general injunction not to violate the law, and thus by merely changing the name or nature of the proceedings, take away this guarantee? Yet, if the Court is authorized to issue a general injunction, it would merely substitute its general order for the mandate of the

law; such an order would not give any additional force or sanction to the statute; it would simply leave all alleged violations of the law to be tried in contempt proceedings without a jury, and subject the defendant to such punishment, either fine or imprisonment, as the Court might choose to inflict. Such punishment would, of course, not relieve the party of subsequent fine or punishment if indicted under the statute.

In *So. Pac. Co.* v. *Col. Fuel & Iron Co.*, 101 Fed. Rep. 779, C. C. A. Reports, Vol. 42, page 12, the Circuit Court of Appeals held:

> "That a restraining order that neither forbids or commands the doing of any specific act, but simply repeats the general admonitions of the Interstate Commerce Act, should not be granted since such an injunction does not give any additional sanction to the statute, but leaves all vital questions concerning violations of the law to be tried by proceedings for contempt, instead of being tried in the usual manner before a court and jury."

A general injunction would impose on the officers of the C. & O. Railway Company the duty of deciding nice questions of law, and of speculating on the opinion of the court in respect to questions about which lawyers and judges might well differ and impose on them the risk of punishment according to the view which the court might entertain. To extend this injunction so as to embrace any violation of the Interstate Commerce Law would justify the grant of an injunction restraining the doing of any act made criminal by statute. It would put upon the officers of the Railway Company the risk of having to decide what the Interstate Commerce Law means, under pain of fine or imprisonment in contempt proceedings according as the court might view the act in question.

In the course of the argument in the court below it was urged that the C. & O. Railway Company "ought not to object to obeying the law." If the Railway Company should be charged with disobeying the law why should it be tried on such a charge in a

summary way by the court without a jury and without regard to constitutional guarantees? If it is charged with a violation of the law why should it not be tried on such charge in the same way as any other person charged with a crime or misdemeanor? The Railway Company does not object to obeying the law, but it does object to being required to conduct its business under the surveillance of the court, and at the risk of arbitrary punishment in contempt proceedings for alleged violations of the law.

The Elkins Act furnishes no authority for such an order. Prior to that Act the general view was that the court had no power to enjoin except to compel obedience to on order of the Commission. The principal object of that Act was to give the Court in the first instance jurisdiction to enjoin any act, which the carrier was engaged in doing, and which constituted a violation of the law. Congress never intended to overturn the established rules of equity jurisprudence, nor did it intend to substitute the remedy by injunction for all other remedies prescribed in the Act to regulate commerce. The Court might just as well operate railroad properties through a receiver as under a general injunction "to obey the Interstate Commerce Law;" its supervision would not be more complete in the former case than in the latter.

Much reliance was placed by counsel for the Interstate Commerce Commission, in support of their contention for a general injunction, upon the case of *United States* v. *Michigan Central Railroad and others*, 122 Fed., p. 544. That case has no bearing upon the question at issue in this case. In that case the bill charged that the defendant had entered into a conspiracy and combination "to create a monopoly in the transportation of packing house products and dressed meats and grain," and similar proceedings were had against thirteen other railroads. No question in relation to a "combination or conspiracy" is involved in the case at bar. A temporary injunction was entered in the Michigan Central case which we understand was entered in the first instance by consent of counsel. The question at issue was

decided on demurrer, and the only order that was entered was the one overruling the demurrer filed. Whether there should be a permanent injunction, and if so, what its form should be, was never determined so far as we are advised.

Further reliance was placed by counsel for the Interstate Commerce Commission on the *Debs case,* 158 U. S. 583. This case involved the power of the court to issue an injunction against strikers who obstructed the operation of trains over highways of commerce, and interferred with the carrying of mail. The business of the government was forcibly interferred with. The jurisdiction of the court was sustained and an injunction entered against the commission of the specific acts charged in the bill. The decision in that case was placed on two distinct grounds: first, that the United States had a property in the mails, the protection of which was one of the purposes of the bill; and, second, that every government had a right to appeal to its own courts for any proper assistance in the exercise and discharge of the powers and duties entrusted to it for the general welfare. The court said: "The bill filed in this case alleged special facts calling for the exercise of *all* the powers of the Court. If ever there was a special exigency, one which demanded that the court should *do all that courts can do,* it was disclosed by this bill, and we need not turn to the public history of the day which only reaffirms with clearest emphasis all its allegations."

An extraordinary remedy was evoked in this case because the occasion was extraordinary, and the decision furnishes no authority for the proposition contended for by the Interstate Commerce Commission in the case before the court.

A recent decision of this court (*Swift etc.* v. *U. S.,* decided January 30, 1905) is decisive of the question involved in this case. That case involved the power of the court to enter *a sweeping injunction to obey the law,* and this power was denied. The court said:

> "On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the

peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. . . . The defendants ought to be informed as accurately as the case permits what they are forbidden to do."

The court modified the decree of the lower court so as to "restrain such combinations only to the extent of *certain specified devices* which the defendants are alleged *to have used and intend to continue to use.*"

It is submitted that the action of the lower court in refusing to enlarge the injunction in accordance with the contention of the Interstate Commerce Commission was correct.

RANDOLPH HARRISON
and A. R. LONG,
For Ches. & Ohio Ry. Co.

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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, appellant,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. 24.

THE INTERSTATE COMMERCE COMMISSION, appellant,
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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

W. A. DAY, *of Counsel.*

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

These are cross appeals from a decree entered by the Circuit Court of the United States for the Western District of Virginia upon a petition exhibited by the Interstate Commerce Commission under the provisions of section 3 of an act entitled "An act to further regu-

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late commerce with foreign nations and among the States" (32 Stats., 847), which section reads as follows:

> SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty

of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce and the acts amendatory thereof."

* * *

The material facts of the case, as the record discloses them, are as follows:

On December 3, 1896, the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company entered into a contract of the following tenor:

> Contract made between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company.
>
> Said Chesapeake and Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.
>
> And said Chesapeake and Ohio Railway Company further agrees that all said bitumi-

nous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed.

And said Chesapeake and Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake and Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton, New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the 3d day of December, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

By M. E. INGALLS, *President.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By C. E. MELLEN, *Second Vice-President.*

For value received, I hereby guarantee that the Chesapeake and Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

The price of $2.75 a ton for deliveries at New Haven, as stated in the contract, was, it will be observed, the basis price, the price for deliveries at other New England points varying presumably as the distance varied. In the following statement and argument I shall use the average price, which is a few cents greater than the New Haven price, and therefore more favorable to the case of the defendants.

From July 1, 1897, to July 1, 1902, the period during which deliveries under the foregoing contract were agreed to be made, the Chesapeake and Ohio Company delivered to the New York, New Haven and Hartford Company, at New Haven and other New England points, all of the 2,000,000 tons of coal called for by its contract except 59,966 tons, which it was unable to deliver on account of strikes. The coal delivered under this contract was purchased by the Chesapeake and Ohio Company from operators along its line in the "New River District" of the West Virginia coal fields, and was shipped from there over the line of the Chesapeake and Ohio Company to Newport News, Va., and thence by water to New England points. At the time the purchases were made by the Chesapeake and Ohio Company there was upon the statute books of West Virginia an act passed February 15, 1895, making it unlawful and a misdemeanor "for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke." (Record, p. 169.)

During the aforementioned period from July 1, 1897, to July 1, 1902, the Chesapeake and Ohio Com-

pany's rates per ton from the New River district in West Virginia to Newport News on coal destined beyond the Capes were as follows:

There was some contention as to what the rates were from July 1, 1897, to March 8, 1899. The Interstate Commerce Commission contended that the Chesapeake and Ohio Company then had no tariff applicable especially to coal shipped over its line to Newport News, to be thence shipped to New England points, and that therefore during that period it should have charged its local rates on coal hauled from the New River district to Newport News, namely, $2 a ton from July 1, 1897, to January 2, 1899, and $1.55 a ton from January 2, 1899, to March 8, 1899. The Chesapeake and Ohio Company claimed, on the other hand, that during that period its published tariffs of through rates on coal from the New River district to New York were in practice applied to coal destined to New England points, and were therefore the lawful tariffs on coal consigned to those points; and as that view may be accepted without prejudice to the Government's case I shall do so to avoid needlessly multiplying issues. The through rates to New York for the period in question were as follows: July 1, 1897, to January 2, 1899, $2.25; for January 2, 1899, $2; January 3, 1899, to March 8, 1899, $1.75. Three items made up the through rate: (1) The Chesapeake and Ohio Company's charge for transporting the coal from the New River district in West Virginia to Newport News, Va.; (2) the cost of the ocean trans-

portation from Newport News to New England, and (3) the cost of discharging. Therefore the amount which the Chesapeake and Ohio Company should have collected (or charged itself whenever it became a shipper) as its share of the through rate may be found by subtracting from the through rate the sum of items (2) and (3), which I have done in the subjoined table numbered one, in which (as well as in tables to follow), to insure accuracy, the computation has been made for each month of the period, as the cost of the ocean transportation and of the discharging varied from time to time.

TABLE I.

Showing Chesapeake and Ohio Company's published rates per ton from July 1, 1897, to March 8, 1899, on coal transported from the New River district to Newport News:

Period.		Through rate to New England points.	Average cost of ocean transportation.	Average cost of discharging.	Chesapeake and Ohio's rate, New River district to Newport News.
Year.	Month.				
1897	July	$2.25	$0.651	$0.226	$1.373
	August	2.25	.637	.223	1.390
	September	2.25	.666	.222	1.362
	October	2.25	.657	.224	1.369
	November	2.25	.658	.221	1.371
	December	2.25	.675	.228	1.347
1898	January	2.25	.699	.226	1.325
	February	2.25	.664	.229	1.357
	March	2.25	.709	.218	1.323
	April	2.25	.619	.226	1.405
	May	2.25	.649	.228	1.373
	June	2.25	.650	.223	1.377
	July	2.25	.561	.221	1.468
	August	2.25	.549	.220	1.481
	September	2.25	.582	.219	1.449
	October	2.25	.522	.231	1.497
	November	2.25	.553	219	1.478
	December	2.25	.932	.224	1.094
1899	January	1.75	1.061	.221	.468
	February	1.75	1.237	.212	.301
	March	[a]1.75	1.036	.324	.390

[a] To March 8.

From March 8, 1899, to July 1, 1902, the rates, as shown by the Chesapeake and Ohio Company's published tariffs (Record, pp. 87–101), were as follows:

TABLE II.

Showing published rates of Chesapeake and Ohio Company from March 8, 1899, to July 1, 1902, on coal transported from the New River district to Newport News.

Period.	Rate per ton.
March 8, 1899, to May 13, 1899	$0.90
May 13, 1899, to January 17, 1900	.80
January 17, 1900, to February 1, 1900	.85
February 1, 1900, to April 2, 1900	1.00
April 2, 1900, to April 1, 1901	1.15
April 1, 1901, to July 1, 1902	1.25

The final cost of the coal laid down at New England points was made up of four items: (1) The cost of the coal at the mines; (2) cost of ocean transportation from Newport News to New England points; (3) the cost of discharging the cargo at the end of the voyage; and (4) the cost of the rail transportation from the New River district to Newport News. Now, subtracting the sum of items 1, 2, and 3, as furnished by the Chesapeake and Ohio Company itself, from the contract price received by that company from the New York, New Haven and Hartford Company, it will be found that the amount left was, from the first delivery under the contract of December 3, 1896, in July, 1897, to the last, in June, 1902, except during nine months of the year 1899, inadequate by from $0.079 to $0.668 a ton, and by upward of $300,000 in the aggregate, to pay the Chesapeake and Ohio Company its published tariff rates, shown in Tables I and II (*supra*), for transporting the coal from the coal fields in West

Virginia to Newport News. Stated in another way, if, in making deliveries to the New York, New Haven and Hartford Company under the contract of December 3, 1896, the Chesapeake and Ohio Company had charged itself its published rates on the haul from the West Virginia coal fields to Newport News it would, from the first delivery to the last, barring nine months in 1899, have sustained a loss in the transaction amounting altogether to $300,000 in round numbers. These results are shown in detail, month by month, in the subjoined table.

TABLE III.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio.	Published tariff Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio per ton.	Profit to Chesapeake and Ohio per ton.
1897	July	28,890	1,140	$2.845	$0.700	$0.651	$0.226	$1.268	$1.373	$0.105	.....
	Aug	21,619	2,110	2.823	.700	.637	.223	1.263	1.390	.127	.....
	Sept	27,629	870	2.850	.700	.666	.222	1.262	1.362	.100	.....
	Oct	30,129	780	2.843	.700	.657	.224	1.262	1.369	.107	.....
	Nov	29,122	1,980	2.841	.700	.658	.221	1.262	1.371	.109	.....
	Dec.....	33,095	1,270	2.826	.700	.675	.228	1.223	1.347	.124	.....
1898	Jan.....	39,177	660	2.846	.700	.699	.226	1.221	1.325	.104	.....
	Feb.....	45,038	1,310	2.806	.700	.664	.229	1.213	1.357	.144	.....
	Mar	37,704	190	2.858	.700	.709	.218	1.231	1.323	.092	.....
	Apr.....	30,125	1,760	2.815	.700	.619	.226	1.270	1.405	.135	.....
	May	30,128	880	2.824	.700	.649	.228	1.247	1.373	.126	.....
	June ...	40,176	370	2.832	.700	.650	.223	1.259	1.377	.118	.....
	July	20,489	1,540	2.858	.700	.561	.221	1.376	1.468	.092	.....
	Aug	21,769	180	2.841	.700	.549	.220	1.372	1.481	.109	.....
	Sept	21,551	710	2.871	.700	.582	.219	1.370	1.449	.079	.....
	Oct	47,642	1,430	2.819	.700	.522	.231	1.366	1.497	.131	.....
	Nov	27,693	2,020	2.846	.700	.553	.219	1.374	1.478	.104	.....
	Dec.....	23,973	700	2.824	.700	.932	.224	.968	1.094	.126	.....
1899	Jan.....	28,321	2,180	2.834	.711	1.061	.221	.841	.468	.....	$0.373
	Feb.....	10,414	2,180	2.858	.707	1.237	.212	.702	.301	.....	.401
	Mar	28,337	1,290	2.866	.718	1.036	.324	.788	.90	.112	.....

TABLE III—Continued.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio.	Published tariff Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio per ton.	Profit to Chesapeake and Ohio per ton.
1899	Apr.....	52,353	120	$2.846	$0.699	$0.981	$0.213	$0.953	$0.90	.....	$0.069
	May	33,037	160	2.858	.699	.788	.226	1.145	.90	.....	.245
	June ...	33,644	810	2.812	.697	.703	.222	1.190	.80	.....	.390
	July	51,827	920	2.817	.697	.780	.221	1.119	.80	.....	.319
	Aug	23,794	150	2.823	.700	.775	.232	1.116	.80	.....	.316
	Sept	17,600	1,400	2.837	.700	.831	.231	1.095	.80	.....	.295
	Oct	22,406	390	2.826	.700	.936	.220	.970	.80	.....	.170
	Nov	27,025	22	2.836	.699	1.353	.219	.565	.80	$0.235	.....
	Dec.....	31,272	950	2.823	.696	1.368	.218	.541	.80	.259	.....
1900	Jan.....	23,859	220	2.853	.696	1.420	.210	.527	.85	.323	.....
	Feb.....	19,709	200	2.805	.695	1.348	.217	.545	1.00	.455	.....
	Mar	13,240	410	2.844	.699	1.414	.222	.509	1.00	.491	.....
	Apr.....	18,438	1,080	2.850	.924	1.223	.221	.482	1.15	.668	.....
	May	34,129	1,280	2.815	.926	.795	.219	.875	1.15	.275	.....
	June....	30,208	964	2.852	.924	.730	.224	.974	1.15	.176	.....
	July	24,109	1,890	2.822	.928	.694	.228	.977	1.15	.173	.....
	Aug	26,200	1,560	2.814	.923	.655	.221	1.015	1.15	.135	.....
	Sept	36,176	2,190	2.834	.924	.785	.229	.896	1.15	.254	.....
	Oct	46,906	690	2.845	.923	.769	.225	.928	1.15	.222	.....
	Nov	32,820	1,580	2.843	.926	.697	.227	.993	1.15	.157	.....
	Dec.....	26,023	1,330	2.803	.924	.662	.226	.991	1.15	.159	.....
1901	Jan.....	33,716	1,750	2.840	.922	.742	.216	.960	1.15	.190	.....
	Feb.....	43,912	1,240	2.809	.922	.677	.222	.988	1.15	.162	.....
	Mar	48,215	340	2.840	.924	.708	.226	.982	1.15	.168	.....
	Apr.....	24,512	100	2.807	.948	.661	.233	.965	1.25	.285	.....
	May	43,472	650	2.846	.949	.737	.221	.939	1.25	.311	.....
	June....	41,494	1,200	2.813	.949	.676	.227	.961	1.25	.289	.....
	July	32,392	1,460	2.825	.949	.772	.229	.875	1.25	.375	.....
	Aug	36,254	960	2.833	.949	.775	.232	.877	1.25	.373	.....
	Sept	32,424	100	2.841	.949	.784	.225	.883	1.25	.367	.....
	Oct	40,808	460	2.823	.949	.773	.222	.879	1.25	.371	.....
	Nov	36,276	1,050	2.821	.950	.776	.228	.867	1.25	.383	.....
	Dec.....	15,025	1,940	2.797	.950	.768	.218	.861	1.25	.389	.....
1902	Jan.....	34,870	1,610	2.828	.950	.839	.221	.818	1.25	.432	.....
	Feb.....	26,997	260	2.826	.950	.796	.233	.847	1.25	.403	.....
	Mar	31,140	1,800	2.818	.950	.797	.222	.849	1.25	.401	.....
	Apr.....	35,615	2,150	2.845	.950	.834	.224	.837	1.25	.413	.....
	May	39,500	1,655	2.815	.950	.801	.221	.843	1.25	.407	.....
	June....	7,150	1,930	2.791	.950	.773	.191	.877	1.25	.373	.....

Upon the default of the Chesapeake and Ohio Company under the aforesaid contract of December 3, 1896, the New York, New Haven and Hartford Company purchased coal in the open market to make up the shortage of 59,966 tons, and then presented a claim against the former company for $103,910.69, the difference between the cost of the coal at the market price and what the cost would have been on the basis of the contract price, the price of coal having greatly increased owing to strikes among the miners. In lieu of the payment of this claim it was verbally agreed between the two companies some time in April, 1903, that the Chesapeake and Ohio Company should complete the performance of its original contract, that is, deliver or cause to be delivered to the New York, New Haven and Hartford Company 55,966 tons of coal at $2.75 a ton, New Haven basis, the New York, New Haven and Hartford Company further agreeing to accept coal from the Kanawha district instead of the New River district as stipulated in the original contract; and at the time the petition in this case was filed, July 13, 1903, there had been delivered under this verbal agreement 38,077 tons, which were shipped from the Kanawha district in West Virginia to Newport News, Va., over the line of the Chesapeake and Ohio Company, and thence by water to New England points. This coal was furnished by the Kanawha Fuel Company, a selling agency, which, pursuant to a verbal understanding with the presidents of the Chesapeake and Ohio Coal and Coke Company

and the Chesapeake and Ohio Railway Company, delivered the coal to the coal and coke company, which, in accordance with the same verbal understanding, shipped and delivered it to the New York, New Haven and Hartford Railroad Company on behalf of the Chesapeake and Ohio Railway Company. The last-named company settled for the coal by paying the coal and coke company the difference between the cost of the coal to the latter delivered at New England points and the selling price collected from the New York, New Haven and Hartford Company. The services performed by the coal and coke company would thus appear to have been gratuitous, as claimed.

During the time these shipments under the verbal agreement of April, 1903, were made the Chesapeake and Ohio Company's published rate from the Kanawha district to Newport News, on coal destined to points beyond the Capes, was $1.45 a ton. Repeating here the same arithmetical process employed a while ago in connection with deliveries under the written contract of December 3, 1896, it is found that, subtracting the sum of the items which made up the cost of the coal per ton to the Chesapeake and Ohio Company, laid down at New England points (namely, the cost of the coal at the mines, the cost of ocean transportation, and the cost of discharging), from the price per ton received for the coal by the Chesapeake and Ohio Company from the New York, New Haven and Hartford Company, the amount left to pay the Chesapeake and Ohio Company its published rate of $1.45

a ton for transporting the 38,077 tons of coal from the Kanawha fields to Newport News was only about $0.39 a ton, which was inadequate by about $1.06 a ton and by upward of $40,000 in the aggregate. In the subjoined table these results are worked out in detail for each month.

TABLE IV.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points, excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio Company.	Published tariff of Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio Company per ton.	Profit to Chesapeake and Ohio Company per ton.
1903.	May	17,627	2,160	$2.805	$1.28	$0.932	$0.223	$0.36	$1.45	$1.09	.....
	June ...	16,141	1,870	2.801	1.28	.870	.231	.42	1.45	1.03	.....
	July	4,309	.....	2.810	1.28	.900	.250	.37	1.45	1.08	.....

It is thus demonstrated by the facts furnished by the defendants themselves that under the written contract of December 3, 1896, and the verbal contract of April, 1903, the Chesapeake and Ohio Company sold, transported, and delivered to the New York, New Haven and Hartford Company nearly 2,000,000 tons of bituminous coal for a price which, after paying the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England points, and the cost of discharging, failed, by an amount ranging from $0.079 to $1.09 a ton, and aggregating over $340,000 on all shipments, to yield to the Chesapeake and Ohio Company its published tariff for transporting

the coal from the coal fields to Newport News. The petition filed herein by the Interstate Commerce Commission alleged that this was tantamount to transporting the coal for that much less than the Chesapeake and Ohio Company's published rates, in violation of the acts to regulate commerce, and prayed, in effect, among other things, that further deliveries by the Chesapeake and Ohio Company under the terms of its verbal contract of April, 1903, with the New York, New Haven and Hartford Company be enjoined (the written contract of December 3, 1896, was not then in force, of course), and that the Chesapeake and Ohio Company be enjoined, following the language of the act to further regulate commerce with foreign nations and among the States, approved February 19, 1903, to observe its published rates on coal in the future.

The Circuit Court sustained the petition, not, however, upon the ground advanced therein, that the course of dealing between the two defendants was tantamount, in legal effect, to the Chesapeake and Ohio Company's transporting the coal in question for itself, as a vendor and shipper, at less than its published rates of freight, but upon the ground that the transactions denounced in the petition worked a discrimination against all other coal shipped to New York and New England points from the West Virginia mines, in violation of section 3 of the act to regulate commerce; and the court enjoined the further carrying out of those particular transactions, but did not enjoin upon the Chesapeake and Ohio Company to observe its pub-

lished rates on coal in the future, as prayed in the petition. The decree is as follows:

> This cause having been argued by counsel, and the record and said arguments having been considered, for reasons set out in a written opinion now filed, it is adjudged, ordered, and decreed:
>
> (1) That the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from the partial nonperformance by said railway company of the contract of December 3, 1896, set out in the record, is, as to the whole of said claim and as to interest thereon, an illegal and unenforceable claim.
>
> (2) That the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Va., over the line of said railway company, and thence transported by vessel to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.
>
> (3) That the said Chesapeake and Ohio Railway Company, and all its officers, agents, and employees be, and they are hereby, perpetually enjoined and restrained from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either the said contract of 1896 or said agreement of

April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

(4) That said New York, New Haven and Hartford Railroad Company, and all its officers, agents, and employees be, and they are hereby, perpetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing, or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction either in lieu of performance, or as damages for nonperformance.

(5) That the defendants herein each pay its own costs herein incurred, and that the Chesapeake and Ohio Railway Company pay the costs in this behalf incurred by or for the complainant, the Interstate Commerce Commission.

The Interstate Commerce Commission thereafter moved the court to enlarge the decree so as to make it enjoin upon the Chesapeake and Ohio Company to observe its published rates on coal in the future, as the

Commission contended the court might do under the provisions of section 3 of the aforesaid act of February 19, 1903, the so-called Elkins Act. This motion was overruled, however, the court taking the position that the act referred to authorized an injunction of that character only where the carrier was transporting freight at less than its published rates, and that therefore it could not order such an injunction in the case before it because it had already declined to hold, upon the facts disclosed, that the Chesapeake and Ohio Company was transporting freight for less than its published rates.

The defendant, the New York, New Haven and Hartford Company, prosecuted an appeal from the decree of the Circuit Court because the petition was not dismissed as to it, and the Commission prosecuted a cross appeal because, although the petition was sustained, it was sustained upon a ground different from that advanced by the Commission, and as a result the Commission was not granted the relief it sought.

The assignment of errors of the New York, New Haven and Hartford Company is as follows:

> The defendant, New York, New Haven and Hartford Railroad Company, prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error—
>
> First. That the said Circuit Court of the United States for the Western District of Virginia erred in adjudging, ordering, and decreeing that the claim of the New York, New Haven

and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from the partial nonperformance by said railway company of the contract of December 3, 1896, set out in the record, is, as to the whole of said claim, and as to interest thereon, an illegal and unenforceable claim.

Second. That the said court erred in adjudging, ordering, and decreeing that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Va., over the line of said railway company, and thence transported by vessel to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.

Third. That the said court erred in adjudging, ordering, and decreeing that the said Chesapeake and Ohio Railway Company, and all its officers, agents, and employees, be, and they are hereby, perpetually enjoined and restrained from in any manner, directly or indirectly, executing or performing, or attempting to execute or perform, either the said contract of 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

Fourth. That the said court erred in adjudging, ordering, or decreeing that said New York, New Haven and Hartford Railroad Company, and all its officers, agents, and employees, be, and they are hereby, pepetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction, either in lieu of performance, or as damages for nonperformance.

Fifth. That the said court erred in not dismissing the complaint of the complainant in said case.

Sixth. That said court erred in holding that the facts proven in said case constituted any violation of the third section of the interstate-commerce act.

Seventh. That the interpretation put upon the language of the third section of the interstate-commerce act by the said court in its opinion and decree is erroneous and unjust to the said appellant, and the appellant is not in the complaint in this case alleged to have violated the said section or any of the provisions thereof.

Eighth. That this said court erred in holding and deciding that the complaint duly alleged and charged that an offense had been committed by the appellant against the provisions of the third section of the interstate-commerce act, and in finding that there was evidence to sustain such charge.

Ninth. That the said decree is in other respects erroneous and unjust to this appellant.

Wherefore the appellant prays that the decree of the said Circuit Court be reversed.

The assignment of errors of the Interstate Commerce Commission is as follows:

The plaintiff, the Interstate Commerce Commission, prays an appeal from the final decrees of this court, entered in the above-styled cause on the 19th day of February, 1904, and the 14th day of March, 1904, to the Supreme Court of the United States, and assigns for error:

1. That the Circuit Court of the United States for the Western District of Virginia, after finding that the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company, and thence

transport by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake and Ohio Railway Company, its officers, agents, and employees, from, in any manner, direct or indirect, executing or performing or attempting to execute or perform either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements, or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake and Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake and Ohio Railway Company from transporting coal from one State to or through any other State for the New York, New Haven and Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven and Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable

preference or advantage, and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven and Hartford Railroad Company and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the Chesapeake and Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage.

2. And whereas, on the 4th day of March, 1904, the complainant, the Interstate Commerce Commission, moved the said court to amend the order entered in the above cause on the 19th day of February, 1904, by inserting the following paragraph:

And the defendant, the Chesapeake and Ohio Railway Company, is restrained and enjoined from transporting coal from one State to, into, or through any other State for the New York, New Haven and Hartford Railroad Company, or for any other person, firm, company, or corporation, at a less rate than the duly established freight rate of the Chesapeake and Ohio Railway Company, in force at the time, and filed with the Interstate Commerce Commission.

And whereas the court, by order, entered herein on the 14th day of March, 1904, overruled the complainant's motion, and declined to change or amend the order entered herein as aforesaid on the 19th day of February, 1904,

it is assigned as error that the said modification of the order of the 19th of February, 1904, should have been made by the court herein.

3. It is further assigned as error that the court found that the loss made by the Chesapeake and Ohio Railway Company from July 1, 1897, to July 1, 1902, in the transportation of the coal in the record set forth by the Chesapeake and Ohio Railway Company, for the New York, New Haven and Hartford Railroad Company, was a loss by the Chesapeake and Ohio Railway Company as a vender of coal; whereas the court should have held that such loss occurred by reason of the Chesapeake and Ohio Railway Company charging to the New York, New Haven and Hartford Railroad Company, or to the shipper of said coal, less than the published tariff rates of the Chesapeake and Ohio Railway Company within and during said period, in force and duly filed as required by law.

4. That the court held that the loss by the Chesapeake and Ohio Railway Company in the transportation of coal for the New York, New Haven and Hartford Railroad Company, after April 1, 1903, was a loss to the Chesapeake and Ohio Railway Company as vendor of said coal, whereas the court should have held that the loss to the Chesapeake and Ohio Railway Company was really a cut or rebate or departure from its established tariffs of rates on coal, in effect during said period.

5. The court should have held that the contract between the Chesapeake and Ohio Rail-

way Company and the New York, New Haven and Hartford Railroad Company of December 3, 1896, was absolutely void and illegal, being in violation of the act to regulate commerce, and for failure to deliver coal thereunder, it should have been held that no liability could be successfully asserted against the Chesapeake and Ohio Railway Company.

6. The court should have held that no legitimate claim for damages could be asserted against the Chesapeake and Ohio Railway Company for failure to deliver coal under the contract of December 3, 1896, and that said contract was not binding on the said Chesapeake and Ohio Railway Company.

7. The court should have held that the contract of December 3, 1896, between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, was an option to the New York, New Haven and Hartford Railroad Company to take, within five years, any amount of coal which it may want, not to exceed 2,000,000 tons, and not exceeding 400,000 tons per annum, and the court should have held further that the Chesapeake and Ohio Railway Company had the option on July 1, 1902, to cancel all portions of said quantity of coal remaining undelivered.

8. The court should have held that the Chesapeake and Ohio Railway Company was guilty of discrimination as defined in section 2 of the act to regulate commerce in the carriage and delivery of the coal to the New York, New Haven and Hartford Railroad Company.

9. The court should have held that the Chesapeake and Ohio Railway Company violated the provisions of the act of Congress approved February 19, 1903, in that it was engaged in the carriage of freight traffic between given points at less than its published rates on file, and that said railway company was committing a discrimination forbidden by law, and the court should have entered such an order as would have enforced, on the part of the Chesapeake and Ohio Railway Company, an observance of its published tariffs, and should have directed and required of the Chesapeake and Ohio Railway Company a discontinuance of such discrimination; and the court should have made said order apply to the Chesapeake and Ohio Railway Company and to the New York, New Haven and Hartford Railroad Company, the latter being the party interested in the traffic.

Wherefore the plaintiff prays that the decree of the said Circuit Court, in declining to amend said decree, be reversed, and that the decree of February 19, 1904, be amended and be made to conform to such an order as the Circuit Court aforesaid should have entered.

THE ARGUMENT.

The interest of the Government in this litigation and its position upon the questions of law involved may be put in a clearer light, I think, and the whole discussion simplified, if in place of the foregoing assignments of error the following single assignment be substituted:

The Circuit Court erred in deciding that the Chesa-

peake and Ohio Company was not transporting freight for less than its published rates, when, as the court found to be the fact, that company sold and was delivering coal to the New York, New Haven and Hartford Company at New England points for a price less than sufficient to pay its published rates for transporting the coal over its line from the mines to Newport News after taking out of the price so received the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England, and the cost of discharging.

This proposition lays bare the one vital issue in the case, and inasmuch as a decision upon that issue in favor of the Government's contention will decide the case, it will not be necessary to discuss any other question except in so far as the solution of this one may depend upon the solution of others.

I shall admit, for the purposes of this argument, that under both the written contract of December 3, 1896, and the verbal contract of April, 1903, the Chesapeake and Ohio Company was the vendor and shipper of the coal, and the New York, New Haven and Hartford Company the vendee and consignee, and that the last-named company at no time became the shipper, and therefore at no time could have received any rebates or concessions from the Chesapeake and Ohio Company's published freight rates. These admissions agree with the contentions of the defendants and with the findings of the Circuit Court, and by making them the field of controversy is cleared of mere questions of fact or of mixed law and fact. In further ex-

planation of these admissions upon points disputed in the court below it may be said that it is of comparatively little moment to the Government that the petition of the Interstate Commerce Commission be sustained on *some* ground, and that a decree be entered merely enjoining the Chesapeake and Ohio Company from delivering the few tons of coal that remain undelivered under the verbal contract of April, 1903. The special importance of this case lies in the fact that it presents to this court for the first time the novel and exceedingly important question of construction of the acts to regulate commerce stated in the substituted assignment of error.

Briefly recapitulated, the facts hereinbefore stated or admitted show that at the time the petition in this case was filed the Chesapeake and Ohio Railway Company, a corporation organized under the laws of the State of Virginia to operate a line of railway, was, as a vendor and shipper, and pursuant to a verbal agreement made in April, 1903, delivering bituminous coal to the New York, New Haven and Hartford Railroad Company at points in New England for a price which, after paying the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England, and the cost of discharging at the end of the ocean voyage, left the Chesapeake and Ohio Company only an amount ranging from $0.36 to $0.42 a ton with which to pay itself, as carrier, its published rate of $1.45 a ton for transporting the coal from the mines to Newport News. (See Table IV, *supra*.)

The facts recited also show that from July 1, 1897, to July 1, 1902, an exactly similar course of dealing in bituminous coal went on between the two defendants under a written agreement dated December 3, 1896, and with similar results (see Table III, *supra*), except that during a few months of the term of this contract the price received for the coal by the Chesapeake and Ohio Company was sufficient to pay its published tariff for the haul from the mines to Newport News, after deducting all cost items, a condition due to the fact that during these months the Chesapeake and Ohio Company's tariff on coal from the West Virginia mines to Newport News was much lower than it was before or has been since. However, this being a proceeding to restrain future violations of the law and not to punish past ones, this contract and the transactions thereunder are material only in connection with the answer hereafter to be made to the contention of the defense, that the New York, New Haven and Hartford Company held a valid liquidated claim against the Chesapeake and Ohio Company, amounting to $103,910.69, for nondeliveries under said contract, the cancellation of which claim the latter company might and did accept in payment for the carriage of freight for the former at the published rates, and that therefore to compute the full consideration that the Chesapeake and Ohio Company received for transporting to Newport News the coal which it sold to the New York, New Haven and Hartford Company under the verbal agreement of April, 1903, the amount

of this claim should be added to what was left of the purchase price under that agreement after the Chesapeake and Ohio Company had paid all cost items, namely, the cost of the coal at the mines, the cost of ocean transportation, and the cost of discharging.

The contention of the Government, upon the facts just recapitulated, is that where a corporation chartered to operate a line of railway undertakes the dual rôle of vendor-shipper and carrier, as the Chesapeake and Ohio Company did under the aforementioned verbal agreement of April, 1903, and receives for merchandise, which it sells and ships over its own line, a price insufficient to pay the cost of carriage over its line computed at the published rates, after taking out the cost of the merchandise laid down at the vendee's place of business, the law will *presume* that the resulting loss was sustained by the corporation in its capacity as carrier and not in its capacity as vendor-shipper; in other words, that the merchandise was transported for less than the published rates, the measure of the deficiency being the difference between the sum of all the cost items, including the cost of transportation computed at the published rates, and the selling price.

To demonstrate the soundness of this position it is only necessary, I think, to point out what would be the result if the law should not step in and raise the presumption contended for from the facts recited. If it should not, a moment's reflection will reveal that it must either (1) be left entirely to the carrier to say whether the loss was sustained as carrier, and hence

whether the goods were transported for less than the published rates, or whether the loss was sustained as vendor—which is to leave it to the carrier to decide whether it has violated the statute; or (2), which is only a shade less absurd, the law must presume that the loss was sustained as vendor. This must be so, because the issue is not one susceptible of proof. The facts are not in dispute, the controverted point being what is the proper inference to be drawn from admitted facts, and unless it is to be left to the carrier to decide whether or not it has violated the statute, which is impossible, of course, the law must either draw the inference that the loss was sustained as carrier or that it was sustained as vendor; and it would, in my judgment, outrage reason and common sense, as well as our knowledge of the passion of self-interest, to accept the conclusion that a carrier would buy merchandise and transport it to a point and sell it there for less than cost in preference to the conclusion that, being its own carrier, it charged itself less for the transportation than it would have charged others, and in that way made a profit out of the transaction, notwithstanding that the price which it received was less than the sum of the cost of the merchandise and the cost of transportation computed at published rates.

But if there were any doubt as to which of the two is the proper inference to be drawn in such a case, that is, whether it should be presumed that the loss was sustained as carrier or as vendor, the evil consequences sure to follow if the latter inference were

drawn would furnish cogent and abundant reason for resolving the doubt in favor of the former. If a railroad company having authority to buy and sell merchandise, or usurping authority to do so with the acquiescence of the State which created it, may transport goods to market over its own line and sell them there for less than the cost of the goods plus the cost of the transportation computed at the published rates, manifestly it may destroy every producer and shipper along its line. Or worse yet, and a much more likely result, it might purchase goods from producers whom it desires to favor at fair or, if it choose, high prices, and transport these goods to the markets and sell them for more than their cost, but for less than the sum of their cost and the railroad company's published rate for the transportation, to the utter ruin of all other producers of the same class of goods along its line. There would thus have been found a new, convenient, and safe means—safe because beyond the reach of the law—to evade our supposedly stringent statutes against rebates and concessions from the published rates of common carriers, and the latter might grant, and powerful shippers might exact, with impunity those undue preferences and advantages in transportation, universally condemned, which have wrought such grievous injustice in the past, and which the legislative and executive branches of the Government have been persistently laboring to stamp out.

I shall now advert briefly to the reasons which persuaded the learned judge of the Circuit Court to reject

the Government's contention that in a case such as this the law will presume that the loss was sustained as carrier and not as vendor.

He concedes "that where [as was the case here], at the very inception of the contract, there is a loss to the vender-carrier, it is somewhat difficult to ascribe an intent to lose on the article dealt in, rather than an intent to simply carry at less than the rates given to the public." (Record, p. 221.) And he also concedes "that the effect to the carrier, to its vendee, and to the *public*, is exactly the same, whether the transaction be considered as a loss on carriage (and hence a rebate on freight rates) or as a loss suffered on the article dealt in." (Record, p. 222.) But, notwithstanding, he shrinks from presuming that the loss was suffered as carrier, rather than as vender, because he finds no evidence of an *intent* to carry at less than the published rates of the Chesapeake and Ohio Company. (Record, p. 221.) He states: "There is no evidence that, at the time he made the contract of 1896, Mr. Ingalls knew the prices he must pay the coal operators or the water carriers. * * * When the contract of 1896 was made, Mr. Ingalls may have expected to purchase the coal at so low a price that the aggregate of cost items and the Chesapeake and Ohio freight rate would have been at least equaled by the contract price to be paid by the New Haven Company."

In the first place it is not necessary in this case to prove intent. The *fact* of carriage at less than published rates constitutes the violation of the statute.

But granting that it were material, intent is something that can seldom be proved directly. It must generally be proved by inferences from other facts. And as the learned judge below himself concedes that upon the facts of this case it is difficult "to ascribe an intent to lose on the article dealt in," and as no evidence of such an intent was produced, surely it is consistent with justice and with the probabilities of the case to presume the only other possible intent, namely, an intent to suffer the loss as carrier. Furthermore, there is evidence in the record (affidavit of comptroller of Chesapeake and Ohio Company, record, p. 187) showing that the Chesapeake and Ohio Coal Agency Company, which acted as agent of the Chesapeake and Ohio Railway Company in making deliveries of coal under the agreement of December 3, 1896, in settling with its principal, the railway company, deducted from the price received from the New York, New Haven and Hartford Company the cost of the coal and all other cost items, turning over to the railway company the balance, which, as heretofore demonstrated, was insufficient to pay its published rates for hauling the coal to Newport News. This shows that the parties themselves dealt with the loss as a loss on carriage, and the *fact* that they did so treat it is cogent evidence that it was their *intent* that it should be so treated. I fail to see how anything can be made of the point that there is no evidence that the president of the Chesapeake and Ohio Company knew at the time the contract of December 3, 1896, was made what prices he would have

to pay for the coal and for ocean transportation, and that, for all that the evidence shows, he may have expected such prices to be so low that the sum of all the cost items and the Chesapeake and Ohio Company's published charges for transporting the coal would not exceed the price contracted to be paid by the New York, New Haven and Hartford Company. If necessary it would be presumed that he knew what the coal and the ocean transportation would cost, since it is unreasonable to suppose that a person will sell goods without having informed himself what they will cost him.

The court below also puts the following case: "Let us suppose," it says, "that the Chesapeake and Ohio were to make a contract to deliver New River coal to a purchaser in New England at a price which at the time covered the cost of the coal, its own published freight charges, and all water costs. We will also assume, as we are seeking an illustration, where the contract is made in perfect good faith that neither party to the contract has any reason to suppose that the cost of the coal or the water costs will, during the life of the contract, advance. With the contract price equal to all cost items and the carrier's full freight rate, I can not perceive any ground for assailing the legality of the contract or of acts done in performing it. When the cost items increase there is a loss to be suffered by the carrier-vendor. To say that this loss is necessarily a loss on carriage, and hence a rebate on freight rates to the purchaser, seems to me to beg the

question." (Record, p. 221.) I do not contend that in such a case the loss would necessarily be a loss on carriage. The contract here supposed would, I think, be a valid contract, assuming the carrier to have authority to buy and sell such merchandise, because there was no loss at its inception, and there is ground for saying that the loss subsequently suffered was sustained as dealer, for it was occasioned by an increase in the cost of coal.

The Circuit Court also suggested this case: Suppose a carrier has purchased a large quantity of some article, intending in the future to sell it and transport it to the vendee's place of business, and the market price afterwards declines, may not the carrier get rid of the article by selling it for a price less than sufficient to pay its published charges for transporting it to the vendee after taking out of the price the original cost? Granting that it may do this, the very most that the concession proves is that there may be exceptional cases where the reasons favorable to the presumption that the loss was suffered as dealer or vendor outweigh those favorable to the presumption that it was suffered as carrier; but of course it does not follow that a general rule must be rejected because it may be subject to occasional exceptions.

This completes the affirmative branch of the argument I set out to make. The point may be made that the provisions of the acts to regulate commerce against discrimination and failure to observe published rates are inapplicable where, as in this case, the railway

company which did the transportation was itself the shipper. I am unable to perceive any reason why this should be so. It seems an utterly immaterial and accidental circumstance that the shipper should be the same corporation which operates the railway over which the merchandise in question was transported to its destination. A railroad corporation can no more discriminate in favor of itself as shipper or producer by transporting merchandise for itself in that capacity at less than published rates than it can so discriminate in favor of a third party.

This view is supported by an opinion delivered by Judge Cooley, then chairman of the Interstate Commerce Commission, in the proceeding entitled *Haddock* v. *Delaware, Lackawanna & Western R. Co.* (3 I. C. C., 296, 316), in which he said:

> All these points, from the second to the sixth, inclusive, it is seen, elaborate and present in different forms the one main contention as regards shipments to the west and north under these contracts, that the respondent, as a common carrier of interstate traffic, being also a producer and purchaser and shipper on its own account, is by law precluded from unjust discrimination in its own favor; that any such unjust discrimination subjects it to the discipline of the act to regulate commerce and brings it within the regulating power of this Commission. It is to this general contention that we shall now direct what we have to say.
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> We shall assume, in whatever will be said upon this case, that the underlying principle of

complainant's contention is sound and just. The respondent is a common carrier, charged with duties to all who may present themselves for carriage or offer their property for that purpose; and one of the highest of these duties is that it shall not discriminate as between those thus offering. This we assume to be the obligation of the common law, and of the constitutional and statutory law of Pennsylvania as well. Whether by the contracts brought into the case there was discrimination as between the complainant and other persons, of which such other persons might find fault, is a question not before us and not in any way involved in this proceeding. We proceed, as already said, upon the assumption that the contracts were valid when made.

But we are confronted here with a situation that is peculiar, and elsewhere than in the coal regions of the country would be regarded as extraordinary. Respondent is not only a carrier for all other persons who may offer, and charged with duties of impartiality as such, but it is also itself a shipper over its own lines. It may be said to offer to itself property for transportation, and this not merely casually and for some temporary or special purpose, but regularly and as a very large part of its business. Indeed, it is probably true that respondent became a carrier because of having immense quantities of property to be carried, and that its line was constructed mainly for its own purposes as owner and shipper, the business of common carrier being added to that of producer and dealer in coal with a view to an

> additional profit or to lessen the cost of conducting the primary business. The situation is what creates the difficulty in dealing with the case. It presents the question of impartiality in such a manner that it may not be possible to deal with it as it would in general be deal with if it were to arise as a question affecting rights as between third parties who were shippers only. It might be easy to apply the rule against unjust discrimination in that case, while it might be difficult to call it a rule against unjust discrimination in this case. The right of the complaining party might be precisely the same in each case, and yet the situation might make the method of enforcement quite different, and might even require that a different term should be applied to the wrong from which the complainant suffered. No matter what the situation is, the respondent must not use its power and the means at its disposal as a carrier to avoid performing the full measure of its duty. It must not use them oppressively. It must, as far as possible, deal as between all shippers, including itself as a shipper, in such a way that all shall have proportional benefit whenever demanding its service.

It is true that the question that the chairman of the Commission had before him was whether a carrier might discriminate in favor of itself as shipper, but the same reasoning that would lead to the conclusion that a carrier may not discriminate in favor of itself as shipper would necessarily lead to the conclusion that a carrier may not charge itself as shipper less than its

published rates at the same time that it charges other shippers its full published rates, for that is the very essence of discrimination. It should also be noted that the practical difficulty in the way of separating the cost of the product shipped from the cost of the transportation in Haddock's case is not present in cases such as the one at bar.

The rule that a railway corporation can not in its capacity as carrier, discriminate in favor of itself when engaged in some business other than that of carrier over its line of railway, to the prejudice of others engaged in the same business, was also very emphatically announced by Chief Justice Cockburn in the case of *Baxendale et al.* v. *The Great Western Railway Company* (Railway and Canal Traffic cases, Vol. I, p. 202, S. C. 5, C. B., n. s., 336). The Chief Justice stated the facts of the case to be as follows:

> Down to a recent period the defendants, the Great Western Railway Company, charged a uniform rate of 3s. 6d. per ton on goods conveyed on their railway between their stations at Reading and Paddington. The goods were collected and delivered both by the company and the complainants, Messrs. Baxendale & Co., at a charge of 4s. 10d. per ton. The railway company have now raised the charge for carrying goods under 5 hundredweight to 8s. 4d. (being the aggregate of the former charge of carrying and that of collecting and delivering), with an intimation to the public that the company will collect and deliver goods free of all charges.

> It is alleged on the part of the complainants, and scarcely denied on the part of the defendants, that the real purpose of this arrangement is to compel persons desiring to have their goods conveyed by the railway to employ the railway company to collect and deliver such goods, and thus to secure this business and the profit upon it to the defendants, as well as to exclude the complainants from competing with the defendants in this department of business.

The reasoning employed in the opinion is throughout so peculiarly applicable to the case at bar that I shall quote from it at length. Said the chief justice:

> The main stand made by the counsel for the company was on the ground, first, that, although the legislature has imposed upon railway companies the obligation of affording accommodation on equal terms to the public, it can not have been their intention to deprive them of the right possessed by all trading companies, as well as by individuals, of using their property and managing their affairs, within the scope of the purpose for which they are constituted, in such manner as they think most to their advantage; and, secondly, that in the present instance the company had by act of Parliament the power of raising their rates at their own will and pleasure, provided they raised them equally as against all persons; that here they had raised them equally against all; and that it was not within the authority of this court to fix limits to the amount of accommodation which the company might think proper to

afford gratuitously beyond the conveyance by the railway, for which the toll was charged.

We think there is little difficulty in disposing of these arguments. It is abundantly clear from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms and from the provisions of the statute by which jurisdiction is given to this court against the affording of undue preference or the imposing of undue prejudice or disadvantage that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but, in return for the great powers which it has conceded to them and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public.

The policy and justice of such a requirement are manifest, it being obvious that the powers of a railway company and its monopoly, under the impossibility of all competition, might otherwise be converted into a means of very grievous oppression by a difference in point of charge, or in point of accommodation made in favor of one man at the expense of another, or by disadvantages in respect either of charge or accommodation imposed on one as compared with another. *And it is plain that the oppressive effects of such inequality will be equally great whether its motive and operation be to benefit third parties or the railway company itself.*

Such being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavor to prevent any injustice either in the rate of charge or the degree of accommodation afforded, at the same time that we carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary rights which (subject to the before-named qualification) a railway company, in common with every other company or individual, possesses of regulating and managing its own affairs, either with regard to charges or accommodation, or to the agreements and bargains it may make in its particular business.

Greater difficulty, no doubt, arises in dealing with cases in which the purpose and effect of the matter to be considered, although it may incidentally have the effect of prejudicing third parties, is in reality to the benefit of the company itself, than in those in which the immediate object is to give an undue advantage for the benefit of a third party; yet we think that no serious difficulty will be found in ascertaining the principles on which the authority of this court should be exercised.

It may be convenient, in the first place, to advert to a distinction not always kept sight of in argument between cases in which the interest of the company sought to be promoted by the regulation or act complained of is one

which arises with reference to the railway itself as to which the question occurs and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from those of the particular railway, as where, for example, the company are the proprietors of another railway or carry on some other business. In the latter class of cases it appears to us clear that the company must be taken to be, quoad, the particular railway, in the position of third parties; and that they can not, with a view to such separate interest, give an undue preference or impose an unreasonable disadvantage any more than they could do so to promote the interest of any other party. Thus, if a railway company, being proprietors of one line from A to B, and of another line from C to D, were, in order to obtain the custom of a particular individual on the first of these lines, on which they might be subject to competion from a rival line, to agree to convey his goods on the line from C to D at a cheaper rate than those of another person using only the latter line; or, if a railway company, carrying on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway, for those who employed them as carriers to and from the railway, at a lower rate than for those who did not; in both these cases we should have no difficulty in holding that the company must be considered, as regards these separate interests, in the light

of third parties, and that they can not promote their interests at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of Parliament to secure.

Great difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is the benefit of the company in their character of proprietors of the particular railway. In these cases the court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from the disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property.

* * * * *

We proceed to consider the second ground taken by the defendants, which is, in substance, that having power to raise their rates of charge for carrying on their line, and having done so

equally as regards all, they do not come within the statutory prohibition against undue preference or undue prejudice by affording other accomodation in addition to that of carrying on their line.

We think this argument rests upon two obvious fallacies: First, that of supposing that the whole charge in question is one made by the company in reference to their character and interests with respect to the railway, whereas in reality the charge is made by them in a character and interest independent of the railway, viz, as carriers to and from the termini of the railway; secondly, that the company can convert that which is in reality a charge for collecting and delivering, as well as for carrying, into one for carrying only by affixing to it the latter denomination in their table of rates.

It is true, no doubt, that the company's acts give them power to impose their own rates of charge for the carriage of this description of traffic; but these acts give them no power to impose tolls or charges for collecting and delivery; and it is palpably an abuse of their powers, if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing. Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally; and the company can not be permitted to evade this obligation by colorably pretending that that which is in fact a charge for other

things as well as for carriage is a charge for carriage only.

The court is bound to look at the transaction in its true light, and can not suffer itself to be diverted from its duty of interfering to prevent what, in effect, is such an injustice as it was the purpose of the legislature to prevent, because the transaction is attempted to be covered over by a transparent disguise.

Looking, then, at the alteration in the rates in its true light, we are of opinion that the arrangement is objectionable both as an undue preference given on the one hand and as an unreasonable disadvantage imposed on the other. *It is an undue preferemce to the company in their separate capacity of carriers other than on the line of railway*, inasmuch as they thereby practically secure to themselves the entire monopoly of the last-mentioned traffic to the entire exclusion of the complainants and all others. It is an undue prejudice and unreasonable disadvantage imposed on the complainants, inasmuch as it is plain that their goods, and those of all persons employing them, as, indeed, the goods of all persons other than those who employ the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they employ others to collect and deliver for them, or to an unnecessary charge if they require no such accommodation.

It now remains to reply to the contention of the defense, that the New York, New Haven and Hartford

Company held a valid, liquidated claim against the Chesapeake and Ohio Company, amounting to $103,910.69, growing out of the latter's failure to deliver to the former certain quantities of bituminous coal which it had agreed to deliver under the aforementioned written contract of December 3, 1896, the cancellation of which claim, it was contended, the Chesapeake and Ohio Company might accept in payment for carrying freight for the New York, New Haven and Hartford Company at the published rates, and that therefore to get at the full consideration that the Chesapeake and Ohio Company received for transporting to Newport News the coal which it sold to the New York, New Haven and Hartford Company under the verbal agreement of April, 1903, the amount of this claim should be added to what was left of the purchase price under that agreement after the Chesapeake and Ohio Company had paid the cost of the coal and all other cost items, thus making the amount received for the transportation by the last-named company equal and exceed the cost of the transportation computed at the published rates.

The premises of this proposition may be conceded. That is, it may be conceded, for the purpose of the argument, that the Chesapeake and Ohio Company, without infringing the acts to regulate commerce, could cancel a valid, liquidated claim against it by transporting freight for the claimant until the amount owing for freight charges should, computed at the published rates, equal the amount of the claim. But

the conclusion drawn from this by the defendants does not follow, for in order that the hypothetical rule just stated may apply the freight must, of course, be carried for the claimant. The claimant must be the shipper. In the present case, however, the claimant, the New York, New Haven and Hartford Company, was not a shipper at all. This is not only the fact, but it was very strongly asserted by both of the defendants in their answers. Thus the Chesapeake and Ohio Company averred that the New York, New Haven and Hartford Company "was not a shipper of coal, and had no property in the coal alleged to have been carried, or to be under contract for carriage, until the same had been, or should be, delivered into its coal bins at the several points on its line." (Record, p. 47.) And the New York, New Haven and Hartford Company denied "that it now is or ever has been a shipper of coal over the lines of the Chesapeake and Ohio Railway Company." (Record, p. 58.) In point of fact the Chesapeake and Ohio Company, as heretofore shown, was carrying the coal for itself. It was the shipper.

Furthermore, it incurred the debt of $103,910.69 under a contract to sell and deliver coal. That is, it incurred it as a dealer in coal. nd it requires no elaborate argument to prove that a carrier corporation can not pay a debt contracted when it is acting the part of a dealer by transporting freight in its capacity as carrier, for in such an event it would have charged nothing for its services as carrier. There would in effect have been a rebate of the full tariff. It is no answer

to this to say that the Chesapeake and Ohio Company in that way discharged a debt. It must have incurred the debt as a carrier. When a corporation chartered to operate a railroad undertakes the additional rôle of vendor-shipper, that is, of a dealer in merchandise, it must not confuse its transactions as such with its transactions as carrier, but must, at its peril, keep the two sets of transactions separate and distinct, for the principles of law governing the relations arising out of the one set are often very different from those governing the relations arising out of the other. And this proposition is especially true where, as in this case, the carrier becomes a dealer in violation of its charter and in violation of the law of the State in which it bought the coal which it afterwards sold.

There is still another reason why the cancellation of this alleged claim can not be made to serve the purpose of bringing the consideration received by the Chesapeake and Ohio Company for transporting the coal delivered under the verbal agreement of April, 1903, up to an amount equal to or in excess of the cost of said transportation computed at the Chesapeake and Ohio Company's published rates, and that is that there was really no indebtedness to cancel as the claim is invalid, the contract out of which it grew, namely, the written contract of December 3, 1896, being an illegal contract.

Paragraph 4 of section 6 of the original act to regulate commerce provides as follows:

> And when any such common carrier shall have established and published its rates, fares,

> and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Therefore, under the statutes in force when the contract of December 3, 1896, was entered into, it was unlawful to transport freight for less than the published schedule of rates. And as it has been shown in the statement of facts that the contract of December 3, 1896, worked out the same results that the verbal contract of April, 1903, did, it follows that if I was successful in the earlier part of the argument in establishing the illegality of the latter contract on the ground that its performance by the Chesapeake and Ohio Company was, in legal effect, tantamount to that company's carrying freight for less than its published rates, then, for the same reasons, the former contract must be illegal and therefore incapable of supporting a valid claim.

I confess that I am unable to follow the *reasoning* (Record, bottom p. 223 to top of p. 226) by which the court below reached the conclusion that the contract of December 3, 1896, and necessarily also, the contract of April, 1903, accomplished violations of section 3 of the original act to regulate commerce. I agree with the conclusion, but rather upon the ground, repeatedly

stated, that as the price received for the coal was not sufficient, after paying all cost items, to yield the Chesapeake and Ohio Company its published rate for the transportation, that company, as carrier, had transported the coal for itself, as shipper, at less than its published rates, and had, therefore, given to itself, as shipper, an undue and unreasonable advantage and preference over other shippers.

In the view I have taken of the case, I have not thought it material to dispute the conclusion of the Circuit Court, sustaining the contention of the defendants, that in the contract of December 3, 1896, the words "railway company" (meaning the Chesapeake and Ohio Company), in the clause, "and said *railway company* has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed," were intended for, and should be read as, "railroad company" (meaning the New York, New Haven and Hartford Company); and that similarly, the words "railway company" (meaning the Chesapeake and Ohio Company), in the provision, "said *railway company* has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 18, 1902," were intended for, and should be read as, "railroad company" (meaning the New York, New Haven and Hartford Company).

If the preceding argument has accomplished its object it has established that in the course of dealing

between the Chesapeake and Ohio Company and the New York, New Haven and Hartford Company described in the petition the first-named company has transported coal at less than its published tariff. When such is shown to be the case the third section of the act of February 19, 1903, the so-called Elkins Act, directs that the court having jurisdiction "shall enforce an observance of the published tariffs." It is therefore submitted that, in addition to enjoining the further carrying out of the particular contract and transactions thereunder between the two defendant companies, this court should direct the Circuit Court for the Western District of Virginia, agreeably to the mandate of the said third section of the act of February 19, 1903, to enter a decree commanding the Chesapeake and Ohio Company to observe in the future the published tariffs which it had been departing from, namely, its tariffs on bituminous coal from the mines in West Virginia to tidewater.

W. A. DAY,
Of Counsel.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, appellant,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. 24.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY and The New York, New Haven and Hartford Railroad Company.
No. 27.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is a proceeding instituted July 13, 1903, by the Interstate Commerce Commission under the so-called Elkins Act (32 Stat., c. 708, p. 847), pertinent parts of which follow.

> SEC. 1. * * * The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as

required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. * * *

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce, or acts amendatory thereto, or participates in any rate so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall

be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law.

The petition (R., 1-6)—

The Chesapeake and Ohio Railway Company is engaged in carrying freight at less than its published rates and in committing discrimination forbidden by law. In the spring of 1903 said railway company made a contract to carry 60,000 tons of coal from West Virginia to tide water at Newport News, Va., for shipment to the New York, New Haven and Hartford Railroad Company, for carrying which the freight realized would not exceed 60 cents per ton and much less than the published rate of $1.45 per ton. The Chesapeake and Ohio Railway Company is now engaged in carrying out that agreement and has delivered at least 25,000 tons, for which it has realized much less than the published rate.

The railway company undertakes to justify its action upon the ground that in 1896 it made a contract with the New York, etc., Railroad Company, agreeing to deliver 2,000,000 tons of coal prior to July 1, 1902, monthly as called for, not to exceed 400,000 tons per annum, at the fixed price of $2.75 per ton, New Haven basis. At the expiration of the time specified 60,000 tons of the coal had not been delivered. The petitioner charges that this contract of 1896 was illegal and void, being *ultra vires* and in conflict with the interstate-commerce act.

During the winter of 1902–3 the New York, etc., Railroad Company presented a claim against the railway company for more than $100,000 as damages for breach of contract, and thereafter it was arranged be-

tween them that if the Chesapeake and Ohio Railway would cause to be delivered 60,000 tons of coal at $2.75, the original price, the claim against it would be discharged. In pursuance of this agreement arrangement was made with certain dealers in the Kanawha district of West Virginia to ship that amount of coal to the railroad company prior to July 31, 1903, the railway company bearing the loss from regular rates.

In 1903 the published freight rate of the Chesapeake and Ohio Railway from the Kanawha district to Newport News was $1.45 per ton. The necessary cost of delivering coal from that district, exclusive of railway freights, laid down at New Haven, was as follows: Price of coal at mines, $1.28; ocean rates, about $1; discharging, $0.19; total, $2.47. The railway company, therefore, would receive for freight about 28 cents per ton, or $1.17 less than its published rate.

The petition finally charges that the Chesapeake and Ohio Railway is engaged in carrying freight at less than published rate and discriminating against other coal produced in the Kanawha district; that the New York, etc., Railroad Company receives a rebate or concession upon the traffic carried for it, and that both roads are acting in violation of law. It prays that the Chesapeake and Ohio Railway Company be required to observe its published tariffs; that the New York, New Haven and Hartford Railroad Company be enjoined from accepting or receiving any rebate or concession, and that "the Chesapeake and Ohio Railway Company be enjoined and restrained

from doing anything whatever whereby coal or any other property shall, by any device whatever, be transported by it at a less rate than that named in the tariffs published and filed by such carrier."

The answers—

The Chesapeake and Ohio Railway Company (R., 44–50), admitting that it is engaged in freight traffic between points in West Virginia and Newport News, Va., specifically denies that it made a contract in 1903 to carry coal in violation of its published tariffs. It says that on December 3, 1896, it entered into a written contract with the New York, etc., Railroad Company whereby it agreed to sell and deliver the latter 2,000,000 tons of coal between July 1, 1897, and July 1, 1902, at $2.75 per ton, New Haven basis, and that notwithstanding the allegation of the petition that this contract was illegal and void, it denies such invalidity is an interstate-commerce question or proper subject for adjudication in this proceeding. Large deliveries were made under the contract of 1896 and it would have been carried out but for a miners' strike. On July 1, 1902, there was an undelivered shortage of 59,966 tons. In January, 1903, the railroad company rendered a damage claim for $103,910.69, the obligation of which the railway company recognized, and desiring in good faith to discharge the same agreed verbally to deliver 59,966 tons of Kanawha coal at the original price, and in this way liquidate the claim presented against it. Thereupon arrangement was made with certain coal dealers in the Kanawha district

to deliver the specified amount of coal, the railway company to make good to them the difference between the agreed price of $2.75 and the actual cost. By this arrangement the railway company paid a damage claim against it for more than a hundred thousand dollars, which amount should be taken into account in any just estimate of the consideration to be received and paid for the coal. The arrangement involved no illegal advantage to either of the respondents and imposed no injury upon any shipper.

During the spring and summer of 1903 the price of coal at the mines was $1.28 per ton, the freight rate from the Kanawha district to Newport News $1.45, ocean rate (average) $0.885, and the cost of discharging $0.19, making a total of $3.805—$1.055 more than the agreed price $2.75 per ton at New Haven.

The New York, etc., Railroad Company (R., 58–64) denies that it has ever been a shipper of coal over the Chesapeake and Ohio Railway, or that, so far as it is concerned, any discrimination of rates has been made. It requires for its operations a large amount of coal, and in December, 1896, entered into a written contract with the Chesapeake and Ohio Railway by which the latter agreed to sell and deliver to it 2,000,000 tons of bituminous coal in such quantities monthly as wanted between July 1, 1897 and July 1, 1902, in bins at ports upon its lines, at $2.75 per gross ton. Respondent had no knowledge of the price the Chesapeake and Ohio Railway expected to pay for the coal or the tariff rates thereupon.

During the winter of 1900–1901 the Chesapeake and Ohio Railway, by reason of strikes, failed to deliver as provided by contract, whereby a legal claim for damages arose against it amounting to $160,000, which was discharged by paying $130,000.

Early in the year 1902 a general strike of miners restricted the supply of coal and enhanced the price, rendering it impossible for the Chesapeake and Ohio Railway to supply the amount called for. On July 1, 1902, the shortage amounted to 59,966 tons, which amount the respondent was required to purchase in other markets at an increased cost of $103,910.69, for which sum it rendered a valid account against the railway company. In lieu of payment the respondent agreed to receive the amount of coal in arrears under the original contract, and the Chesapeake and Ohio Railway immediately entered upon the performance of the last agreement, and at the time of filing the original complaint had delivered more than 33,000 tons.

The Chesapeake and Ohio Railway is authorized by law to contract for and sell coal. The contract in this case was made in the State of New York, to be performed in the States of Connecticut, Rhode Island, and Massachusetts.

The proof–

From July 1, 1897, to July 1, 1902, and from April, 1903, to the date the petition was filed, the Chesapeake and Ohio Railway charged and collected its full tariff rates on coal other than that shipped to the New York, New Haven and Hartford Railroad Company from the

New River and Kanawha districts to Newport News for shipment beyond the Capes. The charter of the Chesapeake and Ohio Railway Company does not and did not, in express terms, permit it to buy and sell articles of transportation (R., 66).

A copy of the agreement of 1896 between the respondent railroads follows. The original was executed upon an ordinary printed form, the blanks being filled in with typewritten matter indicated herein by italics. (R., 67, 190.)

> Contract made between the *Chesapeake and Ohio R'y Co.*, of ———, and The New York, New Haven and Hartford Railroad Company.
>
> Said *Chesapeake and Ohio Railway Co.*, for the consideration hereinafter mentioned, hereby agrees to furnish *to* said railroad company *not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.*
>
> And said *Chesapeake and Ohio Railway Company* further agrees that all said *bituminous coal* shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, *and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.*
>
> And said *Chesapeake and Ohio Railway Company* further agrees to deliver all said *bituminous coal* to said railroad company *in its bins at*

such ports upon its line as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said *Chesapeake and Ohio R'y Co.* of all its agreements herein contained, said railroad company agrees to pay for said *bituminous coal* at the rate of *two and seventy-five one-hundredths dollars per gross ton New Haven basis*, settlement to be made *monthly.*

Said Railway Co. has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the *third* day of *Dec., 1896.*

(Signed) CHESAPEAKE AND OHIO RY. CO.,
By M. E. INGALLS.

(Signed) THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By C. S. MELLEN,
Second Vice-President.

For value received, I hereby guarantee that the Chesapeake and Ohio R'y Co. shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

D. H. Matson (R., 145), a coal broker for many years, testified that he was familiar with the course of business in making contracts for the sale of coal and that "'Any portion of this tonnage not shipped by ———, on which date this contract will expire, shall be canceled,' or a clause permitting the seller to cancel all coal not delivered within the period provided for by the contract upon certain conditions, has been and is the usual course of business among dealers in coal."

Coal is carried from the West Virginia fields by the Chesapeake and Ohio Railway to tidewater at Newport News, Va., and thence by ocean vessels to New England.

There is conflict in the testimony concerning published rates on through shipments of coal by railroad and water from West Virginia to New Haven prior to March 13, 1899. The respondents claim (R., 178) that the through rate per ton, including railroad carriage to Newport News and ocean carriage to New England points from April 15, 1895, to and including January 1, 1899, was $2.25, and from January 3, 1899, to March 8, 1899, $1.75. The Commission claims that prior to March 8, 1899, the Chesapeake and Ohio Railway published no through tariff rate for coal between West Virginia districts and New Haven; that from October 1, 1895, to January 2, 1899, the rate to Newport News was $2 per ton, and to New Haven $2 per ton, plus the ocean rate from Newport News; that between January 3, 1899, and March 8, 1899, the rate from the New River district to Newport News was $1.55, and to New Haven that sum plus the ocean rate. (See deposition of Smith, R., pp. 145–6–7–8.)

All parties agree as to rates from the New River and Kanawha districts to Newport News subsequent to March 8, 1899—no through rate to New Haven is claimed. They are set out in the record at page 179 and vary from 80 cents to $1.45 per ton. The latter rate took effect April 1, 1903.

The cost of ocean carriage and lighterage on the coal delivered in May, June, and July, 1903, was approximately per ton 90 cents; discharging, 23 cents; insurance, 1 cent; total, $1.14. (R. 76.)

On December 11, 1896, J. W. Hopkins (R., 69, 114–172), acting for the Chesapeake and Ohio Railway Company, entered into agreement with certain operators in the New River district, West Virginia, for the purchase of 400,000 tons of coal annually commencing June 1, 1897, and ending July 1, 1902, at $0.70 per ton. This provided for an increased price in case of an advance in cost of mining and specified that "the deliveries of coal under this contract are for business outside of any present delivery made over the line of the Chesapeake and Ohio road and not obtainable at existing prices." It further provided: "The existing charge of 75 cents per car made by the Chesapeake and Ohio Railway Company for delivery of cars to their main line is to be abolished on coal delivered under this contract." "In order to develop the mines sufficiently to produce the requisite 400,000 tons per annum required under this contract agreement is made to take, commencing with the execution of this contract, all coal possible and as regularly as may be," etc. (R., 70.)

During the spring of 1903 the Chesapeake and Ohio Railway agreed with the New York, etc., Railroad to deliver about 60,000 tons of coal, the amount in arrears under the original contract of 1896 (R., 13). Arrangements were then made with certain dealers in

the Kanawha district, who undertook to make the deliveries and collect the amount per ton originally stipulated, the railway company to stand any loss. J. R. Thomas, one of the parties, says in reference to this arrangement (R., 126):

> About the middle of April, 1903, a verbal arrangement was made between said affiant, C. J. Wittenberg, president of the C. & O. Coal and Coke Co., and Geo. W. Stevens, president of the Chesapeake and Ohio Railway Company, whereby 60,000 tons of run-of-mine Kanawha coal should be delivered to the New York, New Haven and Hartford Railroad Company to finish out the amount of the coal undelivered upon said contract; that the price at which said coal was to be delivered by said Kanawha Fuel Company was $1.15 per net ton, or $1.28 per gross ton; that said Wittenberg's company, which was then acting as the eastern or tide water agent of said Kanawha Fuel Company, was to handle the movement of said coal beyond the Capes, making deliveries to the New York, New Haven and Hartford Railroad Company, and making settlements with the Chesapeake and Ohio Railway Company and the Kanawha Fuel Company, respectively.

December 31, 1897, the Atlantic Transportation Company agreed with the Chesapeake and Ohio Railway (R., 72) to transport coal from Newport News to New Haven at 50 cents per ton, and to other points at a proportionate rate. This was not carried out.

A statute of West Virginia passed February 15, 1895 (R., 169), makes it unlawful for any railroad

company to engage in the business of buying and selling coal.

A statement of deliveries to the New York, New Haven and Hartford Railroad Company under writing of 1896, in the record, page 76, shows the average price received therefor (approximately $2.84 per ton), cost of the coal, ocean freight, discharging, and insurance. (The price varies according to the port at which it was delivered—New Haven being the basis.) From this it appears the net results to the railway for more than eighteen months subsequent to July 1, 1897, were less than the published tariff charges as claimed by it and that, with the exception of a few months during 1899, the same thing was true up to July 1, 1902.

The original act incorporating the Chesapeake and Ohio Railway Company passed March 10, 1867, is chapter 280, Acts of the Assembly of Virginia, 1866–1867, page 705.

A preliminary injunction restrained the Chesapeake and Ohio Railway from acting under the agreement with the New York, etc., Railroad, and from carrying coal or any other traffic at a rate different from the schedules on file with the Interstate Commerce Commission. (R., 41.)

On the final hearing the court below held the contract of 1896 illegal, and action under it in violation of section 3, interstate commerce act, because other coal shipped beyond the capes was prejudiced thereby; that the claim of the New York, etc., Railroad arising

out of the alleged breach of that contract was unenforceable, and that the agreement of 1903 was invalid because in violation of section 3 of the interstate commerce act. The railroad companies were enjoined from paying or receiving anything on account of the alleged violation of the 1896 contract and from carrying into effect the agreement of 1903.

The court refused, upon application of the Commission, to enlarge the injunction by perpetually enjoining the Chesapeake and Ohio Railway from transporting coal for anyone at less than its established rates.

The Commission has appealed, and complains because the court failed to enlarge the injunction as requested.

The New York, etc., Railroad Company has likewise appealed, and complains of the final decree adjudging the rights of the parties.

ARGUMENT.

I.

The Interstate Commerce Commission complains because the final injunction granted below is too narrow, in that it fails to restrain defendant Chesapeake and Ohio Railway Company "from transporting coal for anyone at less than its established rates."

Section 3 of the Elkins Act provides that when a petition has been filed by the Commission alleging failure to observe published rates or discrimination, "upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of

the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier," etc.

It is important to know how broad injunctions issued in proceedings under this act should be, and to secure an authoritative ruling the question is here presented.

The interstate commerce act was intended to cut up by the roots the entire system of rebates and discriminations and to put all shippers on an absolute equality. (*U. P. Railway Co.* v. *Goodridge*, 149 U. S., 680, 690.)

The Elkins Act was intended to strengthen the former statutes and to give the courts power to enforce them. It should, of course, be interpreted with that end in view. If when a railroad is detected in willfully violating the law by transporting any article at less than schedule rates the only remedy in equity is to restrain it from thereafter so carrying that article for that person, little may be accomplished. But if under the circumstances suggested a broad order forbidding transportation of the article for anybody must be issued, the results may be much more wholesome, and the true purpose of the law may be more fully effectuated.

In the case of *In Re Debs* (158 U. S., 564, 570), an injunction issued "commanding the defendants and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and

refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads, etc."

Debs violated the order and was punished for contempt. If strikers may properly be restrained by such a sweeping injunction, why may not a railroad be enjoined from carrying coal for anybody below published rates?

The statute provides the "court shall enforce an observance of the published tariffs." Unless the road can be enjoined from violating such tariffs as to all persons how can such observance practically be enforced?

I submit whenever in a proper proceeding the court is satisfied that a defendant road has been engaged in carrying traffic at less than published rates on file its duty under the statute is to "enforce observance of the published tariffs" by an injunction prohibiting any action not in accordance with these tariffs.

In *Swift & Co.* v. *United States* (196 U. S., 375, 396, 401) the court said: "We equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We can not issue a general injunction against all possible breaches of the law;" and in accordance with the principle so announced modified the decree below which granted a "sweeping injunction to obey the law."

The proceeding against Swift & Co. was not under the Elkins Act; and, moreover, to require a railroad to

observe the plain terms of its own tariff schedules is a very different thing from a "sweeping injunction to obey the law."

II.

Respondents assert that in 1903 the New York, etc., Railroad Company had a claim against the Chesapeake and Ohio Railway, recognized by the latter as valid, and which can not be questioned here, for the sum of $103,000, and that for the purpose of discharging such indebtedness the railway agreed to deliver (about) 60,000 tons of coal and receive therefor in money $2.75 per ton. They maintain, in effect, that the carrying road was to receive not only the $2.75 per ton, but in addition liquidate the demand against it, and in this way secure a handsome profit above published rates.

The relation of the Chesapeake and Ohio Railway to the coal furnished by Kanawha operators under agreements of 1903 is not entirely clear. Whether in legal effect it bought, owned, and then delivered the coal or whether it employed or induced the operators to deliver the same at New Haven by guaranteeing them a certain net return may be subject to question. In either view, under conditions then prevailing, beyond reasonable doubt; the arrangement constituted an unlawful device for transporting coal at less than published tariff rates and to give an advantage and discriminate, unless the discharge and settlement of the $103,000 claim must be considered part of the compensation.

The Kanawha contractors received for each ton of coal $1.28. The cost of ocean carriage, discharge, and insurance, as shown by the result of actual shipments (R., 76), amounted to $1.14—total, $2.42. The railroad paid $2.75 per ton, leaving of the cash paid only 33 cents for railway carriage, whereas the published rate was $1.45.

I submit—

That the validity and effect of the written agreement of 1896 and transactions in pursuance thereof are proper subjects for inquiry in this proceeding—

That no legal liability for damages against the Chesapeake and Ohio Railway arose out of that agreement, or anything alleged to have been done in pursuance thereof--

And, finally, that if the Chesapeake and Ohio Railway Company was liable for the claim of $103,000 it could not lawfully discharge the same in the way adopted and being pursued in 1903, when the original petition was filed.

III.

Respondents set up the 1896 agreement and transactions under it to justify what otherwise would be manifestly illegal. They say since the Chesapeake and Ohio Railway has admitted the alleged liability the legality of the same can not be questioned in this proceeding.

No extended argument is required to show that a railroad can not avoid the statutes to regulate commerce

or escape its public duties by simply admitting a liability which has no foundation in law. Interstate-commerce acts were passed because the public was not willing to permit the railroads to do as they pleased. The public is vitally interested that no common carrier should admit a baseless liability, for in the last analysis the public will probably have to pay it. A defense bottomed on the recognition of a liability springing from a void contract would be clearly without merit.

In *Union Pacific Railway Co.* v. *Goodridge* (149 U. S., 680, 691)—a proceeding under a provision of the Colorado statute in substantial accord with the interstate-commerce act—the railway company, to justify allowance of rebates, relied on an unliquidated claim for damages against it held by the consignee, and counsel contended "If, in the honest judgment of the officers of the defendant company who made the contract, the considerations which entered into it and upon which alone it was made were sufficient to warrant the company to pay back to the Marshall Company 40 cents per ton for each ton it shipped for five years, that is enough."

Here respondents declare recognition of the claim against it by the Chesapeake and Ohio Railway is conclusive and precludes inquiry in this proceeding concerning the validity of the same.

This court emphatically repudiated the doctrine advocated for the railway company in *Union Pacific Railway Co.* v. *Goodridge*, and undertook to inquire for itself

into the nature and effect of the alleged obligation. Mr. Justice Brown, speaking for the court, declared (p. 690):

> While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality. * * * (P. 691.) To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a cus-

tomer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all the goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported.

IV.

(a)

The agreement of 1896 was at most a gratuitous option or offer by the Chesapeake and Ohio Railway to sell and deliver coal, given with the evident hope of getting business, and subject to revocation at any time before acceptance. The New York, etc., Railroad was at perfect liberty to call or not to call for any amount of coal within the specified limits; it could reject any not satisfactory, and had nothing to gain by "canceling" or "terminating" the contract, but on the contrary might greatly profit by enforcing the same. Conditions then easy to foresee as possible might make cancellation or termination of the contract most important to the Chesapeake and Ohio Railway, and in a gratuitous offer prudence demanded a reservation of the right to take such action.

The contract distinctly provides "said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902" (R., 68). This was no unusual provision in coal contracts (R., 145).

The claim in question arose because a portion of said quantity of coal remained undelivered July 1, 1902, and as the railway company had a right to cancel such portion, no liability for breach of contract arose.

(b)

It was *ultra vires* of the Chesapeake and Ohio Railway to contract with the New York, etc., Railroad to sell and deliver coal. The railway owned no coal and its charter gave it no right to carry on the business of dealing in such merchandise. (R., 66.)

"All doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation." (*Louisville and Nashville Railroad Co.* v. *Kentucky*, 161 U. S., 677, 685.)

Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto. The general rule is that a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, can not be enforced or rendered enforceable by the application of the doctrine of estoppel. (*Union Pacific Railway Company* v. *Chicago, etc., Railway Co.*, 163 U. S., 564, 581.)

"The charter of a corporation * * * is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the

Section 6, Interstate Commerce Act, makes it a misdemeanor for a carrier to charge, demand, collect, or receive greater or less compensation than published rates for transportation of property, or for any service in connection therewith.

The duty of the Chesapeake and Ohio Railway Company accordingly—for performing which no liability for damages could arise—was to decline to deliver coal under the contract of 1896 unless a different course was legitimate because the necessary loss could be properly treated as incident to its operations as dealer as distinguished from those of carrier.

This brings us to consideration of the broad question: Can a railroad, when interstate transportation is involved, make a contract for future delivery at a fixed price of something not owned by it, which must be fulfilled although that price becomes insufficient to meet cost of merchandise plus schedule freight?

The duty of a common carrier is to transport at reasonable rates without preference or discrimination, to advise the public accurately concerning rates, and to give equality of treatment to all shippers. The interstate-commerce act enjoins strict performance of this duty, and should be so construed as to prohibit whatever directly conflicts therewith. The public is not less damnified when a carrier sustains loss upon a contract for delivery of coal because the same is charged to merchandise rather than to the freight account; and it appears absurd to say a railroad may

render the selfsame transaction legal or illegal by the way it keeps books.

Transportation is the railroad's business and from that source its earnings come. Other permissible transactions must be regarded as incidental and intended to enable it to earn freight. If loss occurs where an article has been both purchased and transported the natural course would be to charge it to freight, for, in a broad sense, transportation is the only thing really contributed by the carrier.

Suppose a railroad in good faith, coal being 50 cents per ton and the freight rate 50 cents, should contract to deliver a great quantity as called for during the succeeding five years at $1; and then suppose during that time coal should advance to $1 per ton and the freight rate to $1.25. Under such conditions, when the entire gross receipts would not equal the schedule rate, could the carrier say it had received full freight charges and that the loss was on the merchandise? Such a construction of the statute would tend to destroy its usefulness and open the door to no end of fraud.

This point is elaborated and forcefully discussed in the accompanying scholarly brief by Mr. W. A. Day.

The deleterious effect of permitting railroads to act as dealers in merchandise is lucidly pointed out by the Vice-Chancellor in *The Attorney-General* v. *The Great Northern Railway Company* (1860), 38 Law Journal (Eng.), page 794 (New Series, vol. 29); and by Cockburn, C. J., in *Baxendale* v. *Great Western Ry. Co.*, 28

L. J. C. P., 81—5 C. B. (n. s.), 336. The general subject is discussed in the authorities below:

Haddock v. *Delaware, Lackawanna & Western Railway Company*, opinion by Cooley, chairman, 4 Interstate Commerce Commission Reports, 296.

Coxe Bros. & Co. v. *Lehigh Valley Railroad Co.*, 4 Interstate Commerce Commission Reports, 535.

Grain Rate Case, 7 Interstate Commerce Commission Reports, 33.

Wood on Railroads, vol. 1, Minor's ed., 652, and cases cited.

Baxendale v. *North Devon Ry. Co.*, 3 C. B. (n. s.), 324.

V.

If the claim presented by the New York, etc., Railroad was an indefinite and unadjusted one for damages *Union Pacific Railway* v. *Goodridge* (*supra*), seems conclusive against the contention that it can be treated as part of the consideration for carriage.

If the claim for $103,000 was a definite, fixed, and adjusted one, then I submit it must be treated, if taken into consideration at all, just as though it were money paid the carrier.

The published rate of the Chesapeake and Ohio Railway after April, 1903, on coal carried to Newport News for shipment beyond the Capes was $1.45 per ton. The figures already quoted show that of the contract price there was left after paying for the coal and ocean transportation about 33 cents per ton. Sixty thousand tons

were to be carried, and in addition to the 33 cents per ton the carrier expected, respondents allege, to receive for the whole service $103,000, or, say, $1.70+ per ton, making total freight $2.03 per ton—very much more than the schedule.

Section 6, interstate-commerce act, prohibits charging or receiving more for transportation of property or for any service in connection therewith than is specified in the published schedule. Section 3 of the Elkins Act permits an injunction whenever a carrier is engaged in "committing any discrimination forbidden by law."

I submit that any device or arrangement according to which a carrier is receiving more for transporting freight than the published schedule constitutes a discrimination forbidden by law within the meaning of the act. And I further submit that, without reference to the Elkins Act, under the broad powers of a court of equity an injunction may issue forbidding such a device or practice.

I respectfully ask that the injunction granted by the court below be enlarged and the final decree, with that modification, be affirmed.

J. C. McREYNOLDS,
Assistant Attorney-General.

OCTOBER, 1905.

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